(1)

Supreme Court, U.S.
FILED

No. 03-1431 APR 12 2004

In The

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., et. al.,

Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court must actually provide due process to non-resident class members or simply provide a procedure with the appearance of due process in order to establish jurisdiction over non-resident class members;

2. In the reviewing of a foreign court's assertion of jurisdiction over non-residence class members, whether the second court (the reviewing court) is bound by the jurisdictional recitals set forth in the foreign court's order;

3. Whether the due process accorded to class members in *Cox* and *Spencer* provided the minimum due process protection required under either a substantive or a procedural review, including:

    a. Whether due process requires notice to class members when their identity is contained in the Defendant's database before, during, and after class notice and settlement;

    b. Whether the failure to use subclasses to, e.g., align the interest of multi unit class members, violates *Amchem*;

    c. Whether class counsel conduct in, e.g., the acceptance of a $30 million fee to drop objections, or the settlement of private claims inventory for much larger payments, evidences inadequate representation; and,

    d. Whether a class which is too varied to constitute a state-wide class is sufficiently homogenous to be certified as a national class.

LIST OF PARTIES AND AFFILIATES

The Petitioners are listed below. The Respondents to the proceedings are listed in the caption of the Petition for Certification.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners are not publically owned. No publicly owned company owns ten percent or more of any Petitioner.

Petitioners

Hospitality Management Associates, Inc.
Alan B. Kahn d/b/a Hunt Club Forest, Best Capital Corp., and Kahn Development Co.
Anne L. Darby
Ashley Inns, a partnership, d/b/a Hampton Inn Riverview
Autumnwood Apartments of Walhalla, LP
Beaufort Inns, a partnership, d/b/a Holiday Inn (Beaufort)
Belle Ville Apartments of Clinton, LP
Berkeley Place Apartments of Moncks Corner, LP
Best Western Naval Center, Inc., d/b/a Holiday Inn Express
Bill Anderson and Pansy Anderson
Blackville Properties, LP
Breckenridge Apartments, Ltd.
Brookside Manor Apartments of Newberry, LP
Bryon Porth Rental Associates, LP
Buena Vista II Apartments of Union, LP
C. F. Deer Run Associates, Ltd.
C. F. Park Place Associates, Ltd.
C. F. Sedgefield Associates Ltd.
Cambridge Apartments of Summerville, LP
Canal Court, II, L.P., as general partner for Bentley Court, II, L.P.
Carolina Townhouses, Ltd.
Case Properties, L.L.C.

LIST OF PARTIES AND AFFILIATES – Continued

Castlewood Apartments of Winnsboro, LP
Castlewood II Apartments of Winnsboro, LP
Cedar Ridge Manor Apartments of Ware Shoals, LP
Center Street Townhouses, LP
Centerfield Manor of Denmark, LP
Charles P. Darby, III
Chesterfield Housing Associates, LP
Colony Square Apartments of Clinton, LP
Cottonwood Apartments, LP
Coventry Manor Apartments, Ltd.
Creekside Apartments of Piedmont, LP
Cricket Hill Apartments, LP
David Werton
Devonshire Apartments, LP
Dorchester Properties, LP
Durlach Corporation as managing agent for Parkshore Center and Summit Point
Eagles Landing Homeowners Association, Inc.
Edgewood Apartments of Fort Mill, LP
Edisto Apartments, Ltd.
Eugene Cone
F.D. Scott d/b/a River Ridge Townhouses
Fair Meadow Apartments, Ltd.
Forest View Apartments of Liberty, LP
Fort Mill Townhouses, Phase II, LP
Frenwood Rental Community, LP
Funderburk Housing & Construction Co., Inc. d/b/a Ashley Garden Apartments
G & C Housing, A S.C. Partnership
Gaffney Properties, LP
Glenfield Apartments of Bennettsville, LP
Glenfield Apartments of Bennettsville Phase II, LP
Harleyville Properties, LP
Harvin Manor Limited Partnership, Regency Investment Associates, Inc. and Gordon Blackwell, general partners
Hazelwood Manor of Johnston, LP

LIST OF PARTIES AND AFFILIATES – Continued

Heritage Square Apartments of Newberry, LP
Hidden Valley Apartments, Ltd.
Holly Springs Apartments, Ltd.
Jim England and Susan England
John R. Lee
Johnny Branton
Knollwood II Associates of Lancaster, SC, LP
LSM Enterprises, LLC d/b/a Frierson Mobile Home Park
Laurelwood Apartments of Winnsboro, LP
Laurelwood Apartments of Winnsboro, Phase II, LP
Lexington Downs, LP
McCormick Manor Apartments of McCormick, LP
McCormick Properties, LP
Magna Funding Corporation
Mannington Place, LP
Marina Variety Store, Inc.
Marion Manor Apartments of St. Stephen, LP
Marion Park Associates, A S.C. Partnership
Melvin Worley and Briarwood Mobile Home Park, Inc.
Midway Manor Apartments, Ltd.
Midway Manor II Apartments, Ltd.
North Bluff, North Charleston LP
North Oaks Apartments of Conway, LP
Oakview Townhouses, LP
Oakwood Manor of Bennettsville, LP
Ola Feagin and Tilman Feagin
Pavilion Properties, a South Carolina LP, Debtor In Possession
Pembrook Apartments, LP
Poplar Creek Apartments, Ltd.
Portfolio Investments
Pine Harbour Investment Co., L.L.C. and Bamberg East Apartments, LP
Raintree/Douglas, Ltd.
Richard Ackerman
Ridgecrest Apartments of Central, LP

LIST OF PARTIES AND AFFILIATES – Continued

Ridgeview Apartments of Pickens, LP;
Riverwinds Apartments of Camden, LP
St. George Properties, LP
Saluda Apartments, LP
Sandra C. Kirby
Sandra L. Cantrell
Shady Moss Apartments of Conway, LP
Shannon IV, A S.C. Partnership
Steeplechase I Apartments, LP
Steeplechase II Apartments, LP
Stonegate Apartments of Clover, LP
Summerfield Apartments of Clover, LP
TEC Builders, Inc.
The Meadows Apartments, LP
Thomas Beckman
Timber Ridge Apartments of McCormick, LP
Toler's Cove Homeowners' Association, Inc.
Town & Country Apartments of Lexington, LP
V.P. LP d/b/a Super 8 Motel
Victor Apat, individually and in behalf of R & A Partners
Village Station Apartments, LP
W.O. Powers, Deerfield Run of Rockhill, LLC, and
Huntington Place, Inc.
Wedgewood Associates of St. Stephen, LP
West End Manor Apartments of Union, LP
Westchase, LP
Westwood Apartments of Spartanburg, LP
William Taylor
Williamston Townhouse Apartments, LP
Williston Properties, LP
Windsor Shores Apartments, LP
Winfield Apartments, LP
Woodcreek Apartments of Simpsonville, LP
Woodlawn Apartments of Union, LP
Woodruff Arms Apartments, Ltd.
York Townhouses, LP

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PETITION FOR WRIT OF CERTIORARI

Hospitality Management Associates, Inc., et al. respectfully pray that this Court grant a writ of certiorari to review the judgment of the South Carolina Supreme Court entered in this case on January 12, 2004, which dismissed Plaintiffs' claims based on the granting of full faith and credit to class action settlements enrolled by other state courts.

OPINIONS BELOW

The order of the Court of Common Pleas, Charleston County, South Carolina (App. at 28a) is unreported. The opinion of the South Carolina Supreme Court (App. at 1a), sought to be reviewed, is reported at *Hospitality Management Associations, Inc. v. Shell Oil Company*, 356 S.C. 644, 591 S.E.2d 611 (2004).

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 12, 2004. The jurisdiction of this Court is invoked under Art. III, Sec. II, United States Constitution, 28 U.S.C. § 1257(a), and U.S. S. Ct. Rule 10.

FEDERAL PROVISION INVOLVED

The Full Faith and Credit Clause, 28 U.S.C. § 1738, is reproduced in its entirety at App. 64a. The Fourteenth Amendment to the Constitution (the "due process clause") is reproduced in its entirety at App. 65a.

STATEMENT OF THE CASE

This case raises an important and recurring question regarding the full faith and credit treatment to be accorded to national class action settlements occurring in state court. Circuit and state courts of last resort are in conflict as to the answer. The conflict centers on the scope of review to be utilized by a second court when reviewing the class action court's assertion of jurisdiction over non-resident class

members, when determining whether to accord the earlier class action settlement full faith and credit ("FFC"). As noted by the South Carolina Supreme Court ("SCSCT"), "there are important policy considerations favoring both limited and broad collateral review." However, the SCSCT went on to favor judicial efficiency over jurisdiction and due process. Judicial efficiency, while a laudatory goal, never trumps due process.

The SCSCT, in direct conflict with the Second Circuit and with this Court's Order in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), granted full faith and credit to foreign class judgments with no regard for due process and jurisdiction. (*See* App. at 27a). The SCSCT ruled that the second court is limited to a review of whether there was a procedure in place in the issuing court to protect class members' rights; not whether the procedure was actually utilized or performed its function. If the decision of the SCSCT is allowed to stand, any court in the nation can bind non-resident class members to a national settlement, regardless of the actual notice given or adequacy of representation provided, by simply inserting conclusory recitals regarding notice, jurisdiction, representation, and fairness without regard to whether the court's conclusions are supported by the record.

The undisputed facts presented by the underlying litigation in this case afford this Court the prime opportunity to address this issue. The clear facts of the underlying case show, *inter alia*: 1) that personal notice was not given to known class members; 2) that class counsel operated under multiple disabling conflicts of interest, including withdrawing objections to a competing class settlement in consideration of the payment of additional attorney fees and the settlement of their private inventory of claims at amounts greatly disparate to that which class members received.

This Court has always mandated strict adherence to the due process rights of litigants. In the context of a class action, due process requires notice, an opportunity to participate or opt-out, and adequate representation at all times. The only reasonable avenue for an absent class

member to test whether due process has been accorded is through collateral attack. Review by a subsequent court will be rendered meaningless under the SCSCT decision which exalts form over substance.

This petition is an opportunity for this court to clarify whether the due process principles of *Shutts*, *Amchem*, *Ortiz*, *Stevenson* and *Vermont*, (*see infra*) or whether the superficial procedural review espoused by the Ninth Circuit in *Epstein III*, should be the law of the land.

A. Factual Background

The facts in this lawsuit present a scenario that could arise in any class action settlement where defendants intend to extinguish the rights of class members at minimal expense to the parties.

Petitioners are owners of structures containing polybutylene plumbing systems. Petitioners allege that the Respondents' development and marketing of polybutylene plumbing systems, and manufacturing and distribution of the resin from which the plumbing systems were made, known by the Respondents to be unfit for their intended use, caused damage to Petitioners.

In 1977, Shell acquired a polybutylene plastic resin business and worked to develop a polybutylene based plumbing system intended to capture a large share of the residential market from the copper based systems which had dominated the market for many years. The system was marketed as an alternative to copper plumbing on the basis that the system was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install than copper systems, and that it would last fifty years.

Polybutylene plumbing systems are described as follows:

> The plumbing system used flexible plastic pipes made of polybutylene resin connected by fittings made of a plastic compound called Celcon. The pipes and fittings were joined together by a copper or aluminum crimp ring placed around the

> outside of the pipe at the point where the pipe and fitting were connected. The ring, fitting, and pipe were then compressed using a large wrench-like tool designed by U.S. Brass. The pressure from the crimp ring deformed the pipe and fitting, creating a water-tight seal.
>
> Celanese manufactured Celcon and supplied Celcon pellets to U.S. Brass to be molded into fittings . . . Shell produced the polybutylene resin and provided it in raw form to U.S. Brass.

Amstad v. United States Brass Corporation, 39 Tex. Sup. Ct. J. 351, 919 S.W.2d 644 (1996) (negligence verdicts upheld against Shell and Celanese, but Deceptive Trade Practice verdicts reversed). Shell played a pivotal role in securing building code approvals throughout the United States. *Id.* Shell and Celanese each knew of the defective nature of the product at the time they developed the national market for the product.

Like Celanese, DuPont manufactured an acetal resin called Delrin, which was molded into fittings for use in polybutylene plumbing systems. The manufacturer(s) which converted the resin to piping and pipe fittings ended up in bankruptcy.

The principal source of the failures is "stress corrosion cracking." Chlorine and other chemicals and metals commonly found in drinking water, and/or the presence of heat, neutralize a stabilizer element contained within the polybutylene piping. The destabilization leads to microscopic pin holes. Stress accelerates the deterioration of the pipe and causes leaking. The pipe and fittings are stressed at installation by both crimping and bending.

Just prior to this South Carolina action being filed in May 1995, an Alabama court preliminarily approved and certified a national settlement and settlement class against DuPont (the "*Spencer*" action). Thereafter, the *Spencer* plaintiffs moved for certification of a national trial class against Shell and Celanese. The *Spencer* certification motion was set to be heard on June 28, 1995. Defendants and competing plaintiffs' counsel, concerned that the

Spencer action would eclipse their settlement efforts, filed a national class action against Shell and Celanese in a rural Tennessee county on June 13, 1995 (the "*Cox*" action). The filing in Tennessee was obviously the product of forum shopping. On the same day, the Tennessee action was certified as a national class action.[1] This is commonly referred to as a "drive-by class action."

An all-out war and race to the courthouse occurred between the competing national class actions. *Spencer* class counsel filed objections to the *Cox* settlement, which was a slightly revised version of a settlement that had been twice rejected by courts in Texas, claiming the settlement was inadequate. *Spencer* class counsel sought and received a November 27, 1995 trial date. In the face of this, the *Cox* parties consummated a settlement in July of 1995 and rushed through preliminary court approval of the settlement, a notice program, opt-out period, and fairness hearing. However, as of several weeks before the *Cox* fairness hearing, there were hundreds of thousands of Claimant opt-outs from the *Cox* class action, many of whom were clients of *Spencer* class counsel. (App. 95-98a). The competing class actions mediated in California.

California mediation resulted in a joint national settlement achieved through increased attorneys' fees. To save the deals, Shell and Celanese agreed to pay *Spencer* class counsel $30,000,000 in fees to withdraw their objections to *Cox*. (App. 100a). *Spencer* counsel agreed to contribute its $120,000,000 Dupont recovery to the *Cox* fund; and Shell and Celanese agreed to increase the *Cox* fund by $100,000,000, *i.e.*, $20,000,000 dollars less than the $120,000,000 the *Cox* fund was getting from *Spencer*. *Id.* In other words the net change was that the total settlement fund was reduced by $20,000,000 and the

[1] Defendants acquiesced to the Tennessee class certification without objection, failed to file any responsive pleadings, failed to move for de-certification, and failed to conduct any discovery. In contrast, Defendants filed a writ of mandamus in *Spencer* to reverse the class certification.

attorneys' fees were increased by $30,000,000. The settlement provided few protections for the class members and provided a financial incentive to the Respondents to discourage the proper resolution of claims. The settlement equated to a per unit settlement of less than $150.00,[2] notwithstanding the Respondents' admissions that the average cost of a replumb was approximately $4,100.00. (App. 89-95a). No discovery on the merits ever occurred in either *Cox* or *Spencer*.

Simultaneous with the national settlements, Respondents settled the individual claims of class opt-outs at greatly disparate amounts. The lead member of the *Spencer* class counsel settled his 110,000 claims by forcing 50,000 of his clients to opt back into the *Cox* settlement and procured replumbs for the remaining 60,000 clients *plus* $170,000,000 in cash ($2,833.33 per unit in addition to having their property replumbed.) (App. 104a-110a).

Personal notice of the proposed settlement and of the class members' right to appear, object, or opt-out was not timely had or widely made. The only individualized notice that was provided was to mobile home owners and other persons who happened to learn of the settlement through the media and then requested information. Known claimants listed in the Respondents' own database were not give notice of the settlement. (App. 88). The class representatives in *Cox* and *Spencer*, who were mobile homeowners, made no effort to personally notify owners of multi-unit complexes or site-built homes. No subclasses were utilized. As notice was given prior to the Monterey settlement, no notice of the revised terms or assignments were given to class members.

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[2] The national class was believed to contain 6 million polybutylene plumbing units. The settlement for the 6 million units was allegedly for the sum of $950 million. (App. 100a).

B. Proceedings In The Trial Court

The instant action was filed as a class action in May of 1995 prior to *Cox* being filed or certified as a national class. The threat of class action litigation in South Carolina led the Respondents to agree to advantageous settlements for the original South Carolina plaintiffs, in excess of $25,000.00 per residential unit, in an effort to end the South Carolina class, leaving the remaining unnamed claimants without a remedy. Petitioners thereafter intervened.

Respondents filed dispositive motions in 1997, arguing that the South Carolina action was barred by FFC. Petitioners opposed these motions on the grounds that they were not accorded the due process guaranteed by the United States Constitution in the foreign proceedings: that they were not notified of the pendency of the foreign actions; therefore, they had no opportunity to appear, to participate, or to exclude themselves from the foreign actions. Petitioners further asserted that the foreign courts' recitals of jurisdiction do not bind or limit the South Carolina Court's inquiry and the foreign courts' records do not substantiate their jurisdictional findings. Petitioners additionally assert that even if the notice was not defective, Petitioners' due process rights were violated by the inadequate representation in the national classes.

In an order issued in 1997, the trial court declined to extend full faith and credit to the foreign court orders based on a number of different shortcomings that appeared in those proceedings.

Petitioners thereafter filed a motion to certify a class. The trial court denied class certification, finding that polybutylene plumbing claims were unsuitable for class treatment, not withstanding class treatment in *Cox* and *Spencer*. After denying the class certification, the Court granted Plaintiffs leave to join additional claimants, which they did.

In 2001, the Defendants renewed their dispositive motions based on the doctrine of FFC. No new evidence was submitted by the Defendants. Plaintiffs filed additional evidence relating to questions raised by the trial

judge in the prior Order denying FFC. Although the Respondents proffered no new evidence, the trial court granted the Respondents renewed motions for FFC in 2002, without a hearing. (App. 28a).

Plaintiffs appealed the Order granting FFC and the Order Denying Class Certification to the SCSCT. This appeal was rejected by decision dated January 12, 2004, affirming the trial court.

C. The South Carolina Supreme Court's Decision

The SCSCT in its opinion noted the importance of the two competing interests at stake in this case: an absent class member's right to due process (and his day in court) versus society's interest in the finality of class action judgments. In the end, the SCSCT weighed in heavily in favor of the finality of class action judgments by severely circumscribing the scope of review that a subsequent court may engage in when considering whether the earlier court had jurisdiction over absent class members.

The SCSCT considered most of the relevant precedent but then ignored it. Nowhere is this more apparent than in its consideration of *Amchem*. After correctly noting the meaning of *Amchem*, the SCSCT went on to completely ignore *Amchem*'s holding.

In straining to reach its desired result, the SCSCT also misinterpreted and ignored important facts. It mischaracterized the fee deal which caused the withdrawal of objections to each of the competing class actions, and failed to recognized that the eventual joint settlement of the competing class actions resulted in a lower gross settlement; and that this reduction in gross settlement is what funded the additional attorney fees. It also failed to consider that the parties failed to provide personal notice to claimants known to Respondents. The SCSCT also ignored the conflict posed by the contemporaneous settlement of class counsel's inventory of claims at greatly disparate amounts.

REASONS FOR GRANTING THE WRIT

Supreme Court review is essential to correct the misapplication of this Court's decision in *Amchem* and to eliminate the conflict among the federal circuits and state courts of last resort as to issues of due process and jurisdiction. The Second Circuit has noted a conflict on this very issue between it and the Ninth Circuit. *See Stevensen, infra*. The Court of Appeals of Ohio has adopted the Ninth Circuit's approach.[3] The Supreme Court of Vermont has ruled in accordance with the Second Circuit's analysis.[4]

The SCSCT has now effectively adopted the Ninth Circuit's interpretation of the proper scope of collateral review that eliminates any meaningful avenue to challenge the conduct of class counsel.[5] If permitted to stand, the decision below will allow class action litigants to obtain the preclusive effect of full faith and credit without regard to whether jurisdiction was properly invoked or maintained in the underlying action.[6]

No judicial precedent of this Court allows the SCSCT to compromise the due process rights of litigants and the requirement of jurisdiction in favor of the modern class action settlement in the name of judicial efficiency.

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[3] *Fine v. AOL, Inc.*, 743 N.E.2d 416 (Ct. App. Ohio 2000), *cert. denied*, 532 U.S. 942 (2001).

[4] *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (adequacy of representation is the quintessence of due process in class actions). *See also, State v. Am. Family Mutual Ins. Co.*, 106 S.W.3d 483, 493-4 (Mo. 2003) (concurring opinion discussing limits on asserting jurisdiction over non-resident class members).

[5] *Epstein v. MCA*, 179 F.3d 641 (1999) (*Shutts* does not support broad collateral review; due process only requires the certifying court to adopt appropriate procedures) ("*Epstein III*"), *cert. denied*, 528 U.S. 1004 (1999). Notably, one of the three judges dissented from the Ninth Circuit decision.

[6] The only avenue left will be for non-residents to travel to the foreign jurisdiction and hire counsel, an expensive and onerous proposition, which will often be time-barred.

I. Proceedings Which Lack Constitutional Due Process Are Not Entitled To Full Faith And Credit

A class decision without jurisdiction over an absent party is not entitled to full faith and credit and has no res judicata effect as to that party. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("*Shutts*").

> A [class] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party.

472 U.S. at 805. As stated in, *Kremer v. Chemical Const. Corp.* 456 U.S. 461, 480-1 (1982):

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue . . . 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'

Res judicata or claim preclusion is subject to the same limitation. *Id.* at note 22.

> . . . A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.

Id. at 482.

The mandate of *Kremer* was reiterated fourteen years later in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996) ("*Matsushita*"):

> Every state's law on the preclusiveness of judgments is pervasively affected by the supreme law of the land. To be valid in the rendition form, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the 14th amendment's due process clause.

116 S.Ct. at 888 (Ginsburg, J., concurring and dissenting).

Due process requires that absent class members receive notice; that absent class members be given a meaningful opportunity to participate and opt-out; and that the representation be adequate at all times:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt-out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U.S. at 42-43, 45, 85 L.Ed. 22, 61 S. Ct. 115, 132 ALR 741.

Shutts, 472 U.S. at 812.

Full faith and credit does not override the basic precept of due process that "[a] judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). A person "is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (citation omitted); *see also International Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement").

The comity underlying the full faith and credit obligation has always been understood to be "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause

because the party would not and could not be bound by the judgment even in the state in which it was rendered. *Kremer v. Chemical Constr. Corp.*, 456 U.S. at 480-81 (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83.

Accordingly, it is well settled that a "judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 805; *see also Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945); *Restatement (Second) of Conflict of Laws* § 104 (1969) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states."). *Pennoyer v. Neff*, 95 U.S. 714, 727, 729-33 (1877) (Oregon state-court judgment against California resident was void for lack of personal jurisdiction); *Burnham v. Superior Court of California*, 495 U.S. 604, 608 (1990) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books . . . ").

A. A Subsequent Court Is Entitled To Make Its Own Determination Of Whether The Prior Court Had Jurisdiction

The framers of the Constitution interjected the domestication of foreign judgments as a prerequisite to a state granting full faith and credit so that each state could protect its sovereignty and citizens; for an order to be entitled to domestication, the foreign court must have had the power, *i.e.*, the jurisdiction, to render the judgment. *See Williams v. North Carolina*, 325 U.S. at 229 (Nevada divorce decree was not granted full faith and credit and

did not prevent North Carolina from prosecuting defendant for bigamous marriage). Upon proper averments regarding the foreign court's lack of jurisdiction, the court has the duty to inquire into the jurisdictional underpinnings of the foreign decree. *See Durfee v. Duke*, 375 U.S. 106, 116 (1963).

B. As Petitioners Did Not Appear In The Foreign Action, They Remain Free To Challenge Jurisdiction In This Proceeding

If the challenging party *appeared* in the foreign court to contest jurisdiction, *and* if personal jurisdiction was or could have been litigated in the foreign court, the subsequent court will be bound by the foreign court's determination of jurisdiction. However, if the challenging party never appeared in the first action, the issue of jurisdiction, by definition, could not have been fully and fairly litigated – one party was absent. *Colonial Pacific Leasing Corp. v. Taylor*, 326 S.C. 529, 484 S.E.2d 595, 597 (Ct. App. 1997) (defendant who appeared in Oregon action could not later challenge jurisdiction in South Carolina enrollment action). *See also Durfee v. Duke*, 373 U.S. at 110-12 (foreign court's determination of jurisdictional issue only entitled to full faith and credit where one actually appears and litigates the issue).

C. This Court Is Not Bound By Unsupported Recitals In A Foreign Court's Decree

Recitals in a foreign order are not binding on courts reviewing jurisdictional questions. *Williams v. North Carolina*, 325 U.S. at 230 (state not bound by unfounded or collusive recitals in foreign court order); *Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.*, 226 S.C. at 276, 84 S.E.2d at 867 (testimony showed that the Georgia court's finding of jurisdiction was erroneous). A judicial decree is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded. *Williams v. North Carolina*, 325 U.S. at 232. A foreign court cannot avoid review of its "disposition of a constitutional claim by

casting it in the form of an unreviewable finding of fact." *Id.* at 236.

A recital does not control the later court's inquiry as to jurisdiction:

> Such recital is, of course, not conclusive of the jurisdictional issue in the courts of another state. *Williams v. North Carolina*, supra. The recital of service is belied by the evidence here.

Peoples Nat'l Bank, 84 S.E.2d at 867. The *Williams* court stated:

> On the contrary, it is open to the courts of any state in the trial of collateral issue to determine upon the evidence produced the true domicile of the deceased.

Williams, 325 U.S. at 230-1. The requirement that one state examine another state's jurisdictional underpinnings prior to granting full faith and credit to its judgment is meant to ensure that other states exercise their "reciprocal duty of respect" owed to each state by each other so that the foreign states will not be tempted to exceed their jurisdiction by exercising jurisdiction over matters to which they do not truly have jurisdiction. *Id.* 325 U.S. at 233. Here, the Petitioners are entitled to look behind the *Cox* and *Spencer* courts' self-serving jurisdictional recitals to determine whether the recitals are supported by the record.

D. Tennessee Law Requires Proof Of Jurisdiction

Tennessee law regarding the grant or denial of full faith and credit to foreign judgments is in accord. A party is entitled to contest the personal jurisdiction of the foreign court prior to the foreign decree being enrolled. *Benham v. Fisher*, 650 S.W.2d 759 (Tenn. Ct. App. 1983). If there are questions of fact regarding the foreign court's jurisdiction, the party asserting the foreign decree is not entitled to summary judgment. *Hart v. Tourte*, 10 S.W.3d 263, 268 (Tenn. Ct. App. 1999). In considering summary judgment on full faith and credit, allegations of the non-moving party must be taken as true. *Id.* More importantly, as noted in *Kremer*, because of the guarantee of due

process under the Fourteenth Amendment, the Tennessee and Alabama courts are prohibited from giving credit to a constitutionally infirm judgment, even from their own courts. *Kremer*, 456 U.S. at 482-3.

E. Jurisdiction Was Not Fully And Fairly Litigated In *Cox* Or *Spencer*; Petitioners Did Not Receive Notice And Were Not There To Litigate; And, Objectors' Counsel Were Paid To Withdraw Their Objections

Petitioners did not receive timely notice of the *Cox* and *Spencer* proceeding; they were therefore not even capable of appearing or participating in the proceeding. Since Petitioners did not participate in *Cox* and *Spencer*, Petitioners have obviously not had the opportunity to litigate whether they were subject to the jurisdiction of the Obion foreign County Court. Furthermore, the issue of jurisdiction was not litigated in *Cox* and *Spencer*; in fact, no litigation occurred at all as all objectors were bought off. There were no objectors present at the *Cox* and *Spencer* fairness hearings.[7]

Various parties in the *Cox* proceeding raised objections to the DuPont settlement. As part of their agreement to pay $30 million in attorneys' fees to the *Spencer* objectors to induce them to drop their *Cox* objections, the *Cox* parties also agreed to withdraw any objections they had previously lodged against the DuPont settlement in the *Spencer* court. Concomitantly, *Spencer* counsel withdrew their objections to the *Cox* settlement. Skullduggery should not preclude Petitioners from having their day in court.

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[7] At the *Cox* hearing, several claimants did comment briefly on the settlement. At the two hour *Spencer* fairness hearing, there were no witnesses at all.

II. Substantive Review Upon Collateral Attack Is Proper

The propriety and breath of collateral attack was recently reviewed by the Second Circuit. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001), affirmed by evenly decided court, 539 U.S. 111 (2003). In *Stephenson*, plaintiffs alleged that they were injured by exposure to Agent Orange while serving in the military in Vietnam. In the late 1990s, Stephenson and Isaacson filed lawsuits against manufacturers of Agent Orange. Plaintiffs contended that they were inadequately represented and, therefore, due process considerations prevented the earlier class action settlement from precluding their claims. The Second Circuit agreed.

After finding that collateral attack was appropriate, the *Stephenson* court proceeded on to examine the adequacy of representation under the precedent set forth in *Amchem* and *Ortiz* (discussed *infra*). The court found that there was not adequate representation and held that the Petitioners were not bound by the prior global settlement.

The court in *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (VT 2003), relied on *Shutts* in taking a similar approach as the Second Circuit in *Stephenson*. The Vermont Court found that jurisdiction over absent class members had not been established or maintained for three independent reasons, including inadequate disclosure in the notice and inadequate representation. The Vermont Court rejected the narrow holding of *Epstein III* and conducted a substantive review of the Alabama Court's compliance with the *Shutts* jurisdiction criteria.

Notably, the Vermont court found that even applying *Epstein III*, the settlement court lacked jurisdiction as the Ninth Circuit allows a more detailed review of the adequacy of representation where the defendant knows of the inadequate representation. In *Vermont*, the court found that the defendant in the Alabama case, Bank Boston, had to have known that class counsel wore exaggerating class benefits and/or were in an antagonistic position vis-a-vis their client, the class.

In *Cox* and *Spencer*, the inadequate representation would fall under the Ninth Circuit exception. The defendants participated in, inter alia, the compromise of objections for additional attorney fees, the lowering of the settlement fund to pay for the attorney fees, and the settlement of the private inventory of claims at greatly disparate amounts.

Thus, it was error for the SCSCT to adopt the Ninth Circuit analysis which runs contra to Shutts. However, even otherwise, it was error for the SCSCT to fail to recognize the exception for inadequate representation in which the defendant participates.

Note the forewarning of *Shutts*:

> . . . the only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

472 U.S. at 805. The SCSCT ruling that the record is irrelevant, that only the recitals matter, is not in accordance with *Shutts*.

III. Jurisdiction For A National Class Action Conducted In State Court Requires Constitutionally Sufficient Notice

A line of U.S. Supreme Court cases have established the essentials of due process in class actions: *Hansberry*, *Mullane*, *Eisen*, and *Shutts*, *infra*. The *Mullane* court, relying on *Hansberry*, ruled that personal notice, must be given if the names and addresses of the person affected can be ascertained. The *Eisen* Court ruled that personal notice may not be compromised because the cost of notice is prohibitive. *Shutts* confirmed that *due process* requires that absent class members be given actual notice; that the notice must provide absent class members a meaningful opportunity to participate and opt-out; and that the class representation be adequate at all times.

A. Notice To Non-Resident Absentees Must Be Constitutionally Sufficient

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313. The Court noted that *the right to be heard has little value unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest. Mullane*, 339 U.S. at 314 (emphasis supplied). Citing *Mullane*, *Shutts* set forth that:

> The notice must be the best practicable, further reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Shutts, 472 U.S. at 812.

B. Personal Notice May Not Be Compromised In The Name Of Judicial Economy Or Because Of Prohibitive Cost

In *Eisen*, the Court ruled that class representatives may *not* compromise the notice requirement of due process in light of the cost of notice or potential recovery. The lower court attempted to fashion a program based partially upon individual notice and partially upon notice by publication. The high court overturned, ruling that absent class members are entitled to the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Citing *Mullane*, the *Eisen* Court stated:

> [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived

> in a particular case. It is, rather, an unambiguous requirement of Rule 23.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

> There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

Eisen, 417 U.S. at 176 (footnote omitted). The *Eisen* court concluded as follows:

> We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

Eisen, 417 U.S. at 177 (footnote omitted).

C. The *Cox* Record Does Not Reflect Constitutionally Sufficient Notice

A review of the record in *Cox* reveals a deficient notice program. The only claimants who were targeted with personal notice were mobile home owners. The mobile home notice was mailed halfway through the opt-out period.

The class representatives in both *Cox* and *Spencer* failed to determine which other class members were identifiable for personal notice. The reason for their failure is obvious: identifying and noticing class members takes time and money and the competing class counsel were in a race to the courthouse; furthermore, class counsel misunderstood the law in this regard as evidenced by their representations to the court; lastly, proper notice would cost more *and* increase the number of claims against the Respondents.

At no point did Shell or any plumbing supplier contact known consumers of polybutylene products, e.g., contractors, to personally notify them of the settlement to obtain from them the available identities of other class members. (App. 68a & 80a). Certainly if Shell can market its product to contractors and suppliers, it can be expected to make the effort to make a phone call or send a letter to plumbing suppliers and master plumbers to learn the identity of

class members which resulted from Shell's marketing activity. (App. 67a-71a).

As detailed at length in affidavits of media experts, contractors, and plumbers, the *Cox* multimedia notice program were poor and ineffective; and very little of it actually took place in South Carolina.

D. The Contents Of The Notice Were Deficient; There Was Not Complete Disclosure

With regards to the content of the notice that was given, i.e., the failure to make complete and adequate disclosure, the notices failed to disclose:

1. That class members would be required to assign to the Respondents their rights to a one hundred and twenty million dollar settlement.

2. That the alleged increased settlement fund was being funded through the *Spencer* counsel's acquiescence to assignment of claims.

3. That the Respondents in *Cox* had persuaded thousands of objectors to drop their objections by the payment of disparate settlements, including 170 million dollars in cash.

4. That the Respondents in *Cox* had persuaded the *Spencer* class counsel to drop their objections to the settlement by paying them an additional $30 million in attorney fees.

5. That the settlement included assignment of any claim they may have against the U.S. Brass bankruptcy estate.

6. That the settlement amount of $950 million was not even remotely commensurate with prior jury verdicts and settlements.

7. That the remedy being proposed in the settlement was substantially less valuable than that which was previously being provided by the Respondents voluntarily through the Plumbing Claims Group ("PCG") App. 72a-78a; and,

> 8. That settlement created an adversarial system with incentive for Shell and Celanese to deny claims and/or limit the quality of replumbs. (App. 72a-78a).

Class counsel are fiduciaries to class members and must provide complete disclosure of all material settlement terms to class members. *G.M. Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996); *Accord*, *Premium Inc. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (1984). A class action settlement notice must contain the maximum amount of attorneys' fees sought by counsel and specify the proposed method of calculating the award. *GMC v. Bloyed*, 916 S.W. 2d 949 (Tex. 1996). The source of the fee, whether paid out of the common fund or paid separately by the defendant, is irrelevant. The class action settlement, including both the benefits to the class and the fees awarded to counsel, represented a total dollar value that the Respondents were willing to pay to avoid litigation. *Id.* at 957-958.

E. The Respondents Failed To Notify Class Members Contained In Their Own Databases

As noted in the July 1998 Order denying FCC, the failure to notify known Claimants in their own databases is a glaring example of the defective nature of the entire notice program:

> [T]his court is concerned with the allegations that certain plaintiffs were readily ascertainable. . . . Despite defendants' possession of the PCG database, defendants were unable to produce any evidence that timely notice was sent to persons in the PCG database.

When Petitioners are individually known to Respondents, Respondents cannot avoid giving individual notice or publication. *Eisen*, 417 U.S. at 176-7.

F. The South Carolina Petitioners Did Not Receive Notice Of *Cox* And *Spencer* And Are Not Bound By The Unsupported Recitals Of Jurisdiction In The *Cox* And *Spencer* Decrees

Petitioners never received notice of and never appeared in *Cox* nor *Spencer*. Since they did not appear, they are free to challenge the jurisdiction of the predecessor court in a later proceeding when the Respondents seek to assert res judicata, jurisdictional recitals notwithstanding. The *Cox* Order merely recites that the court has jurisdiction. Under *Williams* this is not sufficient. Because Petitioners in this action never received notice of *Cox* and *Spencer*, they are not bound by the jurisdictional decrees therein.

G. Class Counsel Misled The *Cox* Court As To The Required Notice

Class counsel misled the *Cox* court as to the meaning of the U.S. Supreme Court's holding in *Eisen* when it represented to the *Cox* court: "that cost-effective notice is not only a goal, it's a requirement." August 30, 1995, hearing at 38. This is a complete misstatement of the holding in *Eisen* and typical of the approach which led to the deficient notice program in the *Cox* proceeding.

H. The Notice Provided In *Spencer* Was Not Constitutionally Sufficient

At the *Spencer* full faith and credit hearing, there was no testimony taken and there were no objectors present. Like *Cox*, all the *Spencer* objectors had been bought off. Personal notice was only targeted at mobile home owners.

Like *Cox*, the *Spencer* record evidences absolutely no effort to ascertain the identity of any class members outside of the mobile home list procured from state tax authorities. There is no evidence in the record as to whether or not other members of the class could be identified with reasonable effort and given personal notice. And there was not personal notice to the claimants in Dupont's data base.

IV. Adequacy Of Representation Requires Strict Adherence To Rule 23 Criteria, Appropriate Use Of Subclasses, And Appropriate Conduct By Class Representatives

The U.S. Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), prevents full faith and credit from being be extended to *Cox* and *Spencer*. The Supreme Court ruled *inter alia* that: 1) subclasses must be used to align the interests of class members; 2) the certification of a settlement class requires increased scrutiny, not less; and, 3) if a class (or subclass) is not sufficiently cohesive, it may not be litigated by representation because the due process of the members cannot be adequately protected; and 4) a class (or subclass) must be represented by a plaintiff with similar claims. *Amchem*, 521 U.S. at 623.

A. Shared Exposure, Fairness, And A Claims Regime Do Not Satisfy The Commonality And Predominance Requirements; Conflicts Require Subclasses, Even During Settlement

In *Amchem*, the settling parties contended that the settlement's fairness was a common question, predominating over disparate legal issues that might be pivotal in litigation but became irrelevant under the settlement. The Supreme Court rejected this. *Amchem*, 526 U.S. at 621-2.

> The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, . . . [are] standards set for the protection of absent class members [which] serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Id., 526 U.S. at 621. Proposed settlement classes warrant more, not less caution on the question of certification. *Id.*, 526 U.S. at 620, n. 16. The *Amchem* Court further ruled that class representatives must represent classes or

subclasses which have typical claim and damage considerations. *Amchem*, 526 U.S. at 625-6.

Amchem further indicated that a settlement's failure to properly address and resolve the conflict of future claimants could be fatal:

> Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Amchem, 526 U.S. at 628.

B. A Disabling Conflict Of Interest Between Class Counsel And Class Members Renders The Representation Per Se Inadequate

Following a line of U.S. Supreme Court decisions, including *Amchem* and *Matsushita*, the U.S. Supreme Court, concluded that a conflict of interest between class counsel and the absent class members inhibits adequate representation. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).[8] Similar to what occurred in *Spencer* and *Cox* settlements, the *Ortiz* class counsel put their personal interest ahead of that of the class, in part by settling their private inventory of claims outside of the class settlement. *Ortiz* ruled that this was unacceptable. *Id.* at 855, 863. Here, we have two such violations: the separate settlement of Plaintiff's counsels' private inventory claims and the

[8] An adequate representative, vigorously prosecuting an action, without conflict, is a cornerstone of adequate representation. *Matsushita*, 116 S.Ct. at 889; *Shutts*, 472 U.S. 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.").

$30 million paid by *Cox* to *Spencer* counsel to drop their objections.

C. *Cox* Failed To Assure Adequate Representation For Disparate Groups

The *Cox* class representatives did not propose subclasses or advocate the class interest in such a way that the *Cox* court would have been able to comply with *Anchem's* mandate. The *Cox* court relied on the exposure commonality in certifying one class. The court never evaluated the adequacy of the named Petitioners to represent the diverse interests in the class, did not identify and compare the common and uncommon questions, and relied purely on conclusory recitals. The court's failure in these matters was a direct result of inadequate counsel.[9]

Petitioners have documented the inability of mobile home owner Plaintiffs, such as those in *Cox*, to represent the type of diverse, complex, commercial interests which most Petitioners represent. Subclasses were needed to differentiate between the different types of claimants, *i.e.*, mobile home versus site-built versus multi-family. Each different group of claimants has their own particular needs and problems. For instance, a replumb causes a homeowner inconvenience. A replumb causes an apartment owner loss of rent and potential relocation expenses.

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[9] *Amchem* clearly shows that the law regarding commonality provided to the *Cox* court by Shell on August 9, 1995, was incorrect:

> If you have a settlement, statute of limitations questions are governed by the settlement agreement. The law of all fifty states applies, which it would here in a trial class, no question about it, it's governed by the settlement agreement now. The relief to which the class is entitled is governed by the settlement agreement. So, you have a commonality of issues and a commonality of relief that otherwise you would not have. That's why when there's a settlement, there's a degree of typicality and commonality, that in a trial class you wouldn't have.

These provide for different considerations in a settlement. Moreover, owners of multi-unit complexes would favor a building-by-building replumb test as opposed to a unit-by-unit replumb test which would presumably satisfy a homeowner and is in fact what was included in *Cox*. (App. 77a). Multi-unit complexes also prefer to do their own work so as to mitigate their losses and minimize the disruption of their business.

After considering *Amchem*, the SCSCT expressly ignored *Amchem's* holding by ruling that the appearance of a fair procedure negates the need to conduct an *Amchem*-adequate representation analysis or use the subclasses required by *Amchem*. As the U.S. Supreme Court has ruled that adequacy of representation is part of the due process guaranteed under the Constitution, the SCSCT exceeded its authority in ruling otherwise.

D. Conduct Of Class Counsel Indicates Inadequate Representation

In addition to the above there are a few additional matters worth emphasizing. Class counsel's failure to attempt to quantify the size of the class or to identify its members for the purpose of notice and/or evaluation of claims, evidences an extreme deficiency of representation.

Class counsel not only failed to quantify the claims, but they also failed to value the class claims either individually or on a class-wide basis. Even the Respondents conceded that the average cost of replumb is at least $4,100.00 at the time. (App. 89a-95a). Attorney George Fleming claimed an average jury verdict and settlement per unit of $30,000.00-$40,000.00. (App. 111a). Moreover, even Shell had valued its share of the national liability at $7 billion. (App. 111a). Class counsel ignored this evidence in settling for $150.00 per unit. The act by plaintiffs' class counsel valuing the class claims at less than $1 billion is inexcusable, especially when every trial that had gone to verdict before the *Cox* settlement resulted in a verdict against the Respondents.

The act by class counsel in sending out an obviously defective notice which failed to disclose the $120 million DuPont assignment, and which failed to disclose the U.S. Brass assignment is further evidence of wrongful conduct. The evidence that *Cox* class counsel facilitated the efforts by the Respondents in the *Cox* case to buy off all objectors to the *Cox* class action for $30 million in attorneys' fees is simply the icing on the cake with regards to the conduct of class counsel.

E. The Respondents Failed To Demonstrate Due Process As To Future Or Exposure-Only Petitioners

As highlighted by the *Amchem* decision, and later in the *Ortiz* and *Stephenson* decisions, inclusion of future or "exposure-only" claimants in the class is problematic, if not impossible. "Exposure-only" claimants are persons who have been exposed to a problem but have not manifested the injurious symptoms such that they know they have been exposed. *Stephenson* found that the inclusion of future claimants who did not yet have claims evidenced such inadequate representation such that the later claimants were not bound by the prior class judgment.

The *Cox* and *Spencer* settlements have a similar inherent defect problem. There are many homeowners that have polybutylene pipe hidden behind their walls but do not know of its existence. (App. 70a-1a & 82a). It is therefore difficult, if not impossible, for these potential class members to understand that they are part of the class and that they need to protect their rights. Therefore, it is problematic, if not impossible, to provide due process to these persons. If it can be done, they need to be in a subclass with their own representatives. The conflict between current and future claimants in the polybutylene context is well illustrated by the settlement agreement reached. Although Shell marketed the polybutylene plumbing systems as having a fifty-year life span, the settlement only provides relief for the first ten to fifteen

years of that life span. This obviously favors current claimants at the expense of future claimants.

F. The *Spencer* Representation Was Inadequate

For the most part, the inadequate representation which occurred in *Spencer* was the mirror image of what was occurring in *Cox* during the final stages of the race for judicial approval of settlement. However, the *Spencer* class counsel had the ultimate disabling conflict. *Spencer* class counsel accepted $30 million in attorneys' fees from a non-client to drop their own clients' claims against Shell and Celanese, without prior disclosure or consent. Then likewise they failed to disclose this ransom payment to the absent class members. It has long been recognized that attorney's allegiance extends to his employer, the payor, and the acceptance of money from a non-client without the client's informed consent was a conflict of interest.

Respondents try to claim that the *Spencer* attorneys were paid $30 million for their contribution to the increased *Cox* settlement. However, the math just does not work. On the day before the *Cox* mediation, there was $970 million on the national settlement table: $120 million in *Spencer* and $850 million in *Cox*. After the Monterrey settlement there was only $950 million. The national settlement fund went down $20 million and *Spencer* class counsel received an additional $30 million in attorneys' fees. The funding for the extra attorneys' fees came from the reduction in class proceeds. The failure to disclose this information to the class was in violation of the fiduciary duties owed by class representatives and evidences the inadequate representation.

Moreover, the *Spencer* class counsel "took" (without their client's permission) the $120 million that they had obtained for their respective class members in the settlement with DuPont and gave it to the Respondents to fund the Respondents' settlement in *Cox*. Again, without their clients' knowledge or consent, *Spencer* class counsel withdrew all objections to the *Cox* settlement, thereby subjecting *Spencer* class members to all of the unjustifiable

nuances of the *Cox* settlement, including leak requirements, plumbing exclusions, claims periods, adversarial claims process, and the like. DuPont condoned these surreptitious agreements when it agreed to dovetail the *Spencer* settlement into the *Cox* settlement.

Spencer class counsel suffered from yet another disabling conflict of interest with the class members. Lead class counsel, George Fleming, excluded his 110,000 clients from the definition of the *Spencer* class, then simultaneously settled their claims at the same time as the *Spencer* and *Cox* settlements for per unit sums greatly in excess of that being set aside for class members. In fact, while George Fleming only represented 2% of the potential claimant group of 6 million, and he forced half of those clients back into the *Spencer* and *Cox* settlements, he received a cash settlement equal to 20% of the entire amount Shell and Celanese were paying to settle the nationwide claim in *Cox*.

The *Spencer* settlement suffered from many of the other representative inadequacies that the *Cox* settlement suffered from, including the failure to use subclasses to alleviate the conflict of interest between class members.

V. Denial Of Class Certification Illustrates The Due Process Deficiencies In *Cox* And *Spencer*

Before granting FFC, the trial court denied class certification for a state-wide class, finding that such a proposed class failed to satisfy commonality and typicality. It is theoretically impossible for the trial court to be correct in its denial of class certification and at the same time, be correct in its application of its due process analysis in granting FFC to the *Cox* and *Spencer* class action settlement order.

CONCLUSION

Due process is the vanguard of American jurisprudence. Jurisdiction is essential to due process. Jurisdiction cannot be acquired without compliance with the rules laid down by this Court. A reviewing court must, as a matter of necessity, be permitted to assess jurisdiction *de novo* and not

be limited to acceptance of the conclusory, self-serving recitals of the foreign court that approved the class settlement.

The recent national class action decisions across the country evidence an effort to curb the type of abuses that *Cox* and *Spencer* reflect. The ruling by the SCSCT will only compound the abuses we see today, as it grants carte blanche for future abuse – so long as conflicted class counsel put the right recitals in the final order.

The purpose of class actions is to promote efficiency in the litigation of issues, without compromising the fairness owed to each absent class member by the fundamental concept of jurisdiction. The SCSCT's decision directly contravenes this Court's holding in *Amchem* and Second Circuit and other state jurisprudence on this issue. This case presents this Court with the optimal vehicle for addressing this issue, and thus warrants the granting of a writ of certiorari.

Respectfully submitted,

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April 12, 2004

591 S.E.2d 611

Supreme Court of South Carolina.

HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al., Appellants,

v.

SHELL OIL COMPANY d/b/a Shell Chemical Company, Hoechst Celanese Corporation, and E.I. Dupont de Nemours & Company, Respondents.

No. 25764.

Heard Nov. 18, 2003.
Decided Jan. 12, 2004.

Justice WALLER:

In this direct appeal, the trial court denied appellants' request for class certification and granted summary judgment in favor of respondents. The main issue of this appeal is whether two nationwide class action settlements approved by the Alabama and Tennessee state courts are entitled to full faith and credit, thereby precluding appellants – as absent class members who did not opt out – from proceeding with this action. Moreover, the crucial sub-issue of that question is what is the appropriate **scope of collateral review** this Court should give to the rendering courts' final decisions approving the settlements. The trial court found that: (1) a limited scope of review is proper, and (2) the due process issues were fully and fairly litigated; therefore, the trial court ruled the final settlements are entitled to full faith and credit. We affirm.

FACTS/PROCEDURAL HISTORY

Appellants seek damages against respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E.I. DuPont de Nemours & Co. ("DuPont"), for defective polybutylene plumbing systems. Appellants own structures containing this type of plumbing system. Neither of the respondents manufactured these polybutylene systems, but each produced and sold a resin utilized in the manufacture of the systems.[1] The systems were marketed as an alternative to copper-based systems. Appellants allege respondents **falsely** represented that the polybutylene plumbing systems were of high quality, were reliable, and would last decades. Indeed, appellants claim respondents knew the resins would degrade and corrode when exposed to the chemicals found in ordinary drinking water (e.g., chlorine), and therefore, knew these systems would fail. According to appellants, polybutylene plumbing systems are an "unmitigated disaster" as they experience an unusually high failure rate.

On May 30, 1995, the original plaintiffs filed this lawsuit ("the Howard plaintiffs"). However, two nationwide class action settlements – *Spencer* in Alabama state court and *Cox* in Tennessee state court – were finalized in November 1995; the Howard plaintiffs opted out of these two settlements and subsequently settled their individual

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[1] Shell manufactured and sold polybutylene, which is a raw material plastic, i.e., a resin, to manufacturers who extruded it into the polybutylene pipes used in these systems. Celanese and DuPont manufactured and sold Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.

claims.[2] Appellants successfully intervened in the instant case in 1996 and 1997. The lawsuit was designated as a complex case, and Judge Pieper was assigned to it. Initial discovery in the litigation was restricted to the full faith and credit issue.

Respondents moved for summary judgment arguing that appellants were members of the national class actions which had been settled and those settlements are entitled to full faith and credit. Appellants responded that because class members were not provided with due process, the state courts did not acquire personal jurisdiction, and thus, the final orders should not be accorded full faith and credit. Holding that further inquiry into the facts was appropriate, Judge Pieper denied respondents' motions for summary judgment in June 1998.

Shortly after the denial of summary judgment, Judge Pieper *sua sponte* recused himself after learning that a family member had requested claim information from one of respondents' representatives in the out-of-state litigation. Thereafter, Judge Dennis was assigned to the case.

Respondents moved to have Judge Dennis reconsider or vacate Judge Pieper's order denying summary judgment. The trial court denied this request, finding that Judge Pieper's order was "a temporary ruling which invites another Motion."

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[2] The Howard plaintiffs were three couples who each owned a home with a polybutylene plumbing system. They received settlements for $25,000, $20,000 and $20,000.

Pursuant to Rule 23, SCRCP, appellants requested certification of a class defined, in pertinent part, as follows:

> An opt-in class of all South Carolina persons and entities that own structures in which there has been installed a polybutylene plumbing system, wherever located; and non-resident persons and entities that own such structures located in the State of South Carolina.

Finding that none of Rule 23's requirements had been satisfied, Judge Dennis denied class certification.

Finally, after respondents renewed their motions for summary judgment, the trial court granted judgment in their favor. The trial court found that the Alabama court-approved *Spencer* settlement and the Tennessee court-approved *Cox* settlement were both entitled to full faith and credit. Significantly, the trial court found that the issue of whether absent class members were provided with minimum due process was an issue subject only to extremely limited collateral review, making the dispositive issue whether the due process issue was fully litigated in, and determined by, the Alabama and Tennessee courts. The trial court found that the due process issues relating to the exercise of personal jurisdiction over the absent class members had been fully considered by the *Cox* and *Spencer* courts, and therefore their findings of jurisdiction were entitled to full faith and credit without further review on the merits.

To resolve the issues raised in this appeal, a review of the facts surrounding the nationwide settlements is also necessary.

The Spencer and Cox Settlements

The *Spencer* lawsuit was filed in November 1994 in Alabama state court. At that time, yet another nationwide class action case was pending in a Texas state court, *Beeman v. Shell Oil Co.*, and a settlement was actively being negotiated. Although the parties reached a settlement in *Beeman*, it ultimately fell through when the Texas court denied preliminary approval in February 1995. In May 1995, DuPont reached a settlement in *Spencer*, and the Alabama court preliminarily approved it. However, because the settlement was only with DuPont, claims against Shell and Celanese remained.

According to the original terms of the settlement with DuPont, DuPont agreed to pay 8% of: (1) the actual cash value of physical damage to tangible property caused by a leak in the plumbing system which occurred within 15 years of the installation, and (2) the cost of a replumb completed within 15 years of the installation. The fund for these costs was set at $120 million, and when that amount was paid, DuPont retained the option to provide additional funding. If it opted not to provide additional funding, class members who had not been paid would retain all rights against DuPont.

In June 1995, *Cox* was filed against Shell and Celanese in Tennessee. The same day the lawsuit was filed, the Tennessee court certified the class. Meanwhile, the *Spencer* action was still proceeding against Shell and Celanese, and the Alabama court certified that class as

well. Thus, two competing nationwide classes had been certified.[3]

Negotiations in *Cox* resulted in a settlement being reached with Shell and Celanese on July 31, 1995. The original settlement terms were that Shell and Celanese would provide $850 million to fund replumbs for those claimants who had a qualifying leak. In addition, recovery could be had for physical damage to tangible property resulting from a leak. A centralized facility, the Consumer Plumbing Recovery Center (CPRC), was to be created to administer the terms of the settlement. Like the settlement reached with DuPont in *Spencer,* the agreement tolled the statutes of limitation and repose in the event the fund was exhausted and Shell and Celanese decided not to contribute additional funding. Moreover, future owners were covered by the settlement because the agreement provided for four future notice periods.

Objections were raised to the *Cox* settlement. In October/November 1995, class counsel for both *Cox* and *Spencer* participated in a two-week mediation with California Judge Richard M. Silver,[4] and ultimately, a joint national settlement was reached. This global settlement was basically the *Cox* settlement that previously had been

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[3] It may even be more accurate to say that **three** classes had been certified: a settlement class v. DuPont in Alabama, a trial class v. Shell and Celanese in Alabama, and a settlement class v. Shell and Celanese in Tennessee. The competition aspect, however, clearly was between the trial class against Shell and Celanese in Alabama and the settlement class against those same two companies in Tennessee.

[4] Judge Silver was presiding over another class action suit, this one a statewide class action pending in California.

approved by the Tennessee court, but with several significant changes, such as the joint settlement fund was increased to $950 million; the interest on the funds was to go to the CPRC (not back to Shell and Celanese); and the window for filing claims was increased from one year to two years. In addition, the parties agreed that no objection would be made to *Spencer* class counsel requesting up to $30 million in attorneys' fees. After the global settlement was reached, the objections to *Spencer* by *Cox* class counsel and the objections to *Cox* by *Spencer* class counsel were withdrawn.

On November 17, 1995, the *Cox* court entered a final order approving the class action settlement against Shell and Celanese which included $45 million for class counsel and $3,000 for class representatives. The funds for notice and attorneys' fees were **in addition** to the $950 million in settlement funds. On the same day, the *Spencer* court finally approved the class action settlement against DuPont.

Also on November 17, Shell, Celanese and DuPont entered into an agreement coordinating the two settlements. DuPont agreed to pay 10% of all CPRC costs associated with claims arising from polybutylene plumbing systems with acetal insert fittings, and 10% of CPRC administrative expenses (excluding costs for *Cox* attorneys' fees or notice). These payments by DuPont were to come out of the *Spencer* settlement fund. The coordination apparently allows claimants to file a single claim with the CPRC in order to get relief from both settlements.

ISSUES

Appellants appeal from three orders wherein the trial court granted summary judgment to respondents, denied appellants' request for class certification, and denied respondents' request to vacate or reconsider Judge Pieper's previous order denying summary judgment. However, we find the dispositive issue of this appeal is:

> Did the trial court err in granting summary judgment based on its finding that the *Spencer* and *Cox* final settlement orders are entitled to full faith and credit?

DISCUSSION

Appellants argue that as absent parties who did not appear in the out-of-state actions, they are free to collaterally challenge the *Spencer* and *Cox* judgments based on personal jurisdiction. Appellants claim the Alabama and Tennessee courts did not have personal jurisdiction over them because they were not accorded the minimal due process required for absent class members. Specifically, appellants argue that, for several reasons: (1) notice was constitutionally insufficient; and (2) there was inadequate representation.

Respondents, on the other hand, argue the trial court correctly found that the scope of review when determining full faith and credit is limited to whether the jurisdictional issues were fully and fairly litigated in the rendering courts. Because they claim the issues related to due process were fully and fairly litigated, respondents argue the trial court correctly granted summary judgment without further inquiry into the merits of personal jurisdiction/due process.

Clearly, the **scope of review** aspect of the full faith and credit issue is the threshold question, and, given the current state of the law on this issue, it is also a thorny one.

Scope of Collateral Review

The Full Faith and Credit Clause provides, in pertinent part, that "[f]ull faith and credit shall be given in each state to the . . . judicial proceedings of every other state." U.S. Const. art. IV, § 1. Full faith and credit "generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded **in the State which rendered it**." *Durfee v. Duke,* 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (emphasis added).

The rule in a class action lawsuit is not any different. Indeed, the United States Supreme Court ("USSC") has specifically stated that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit." *Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 374, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996).

Nonetheless, it is also well settled that a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit, and therefore has no res judicata effect as to that party. *E.g., Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Kremer v. Chemical Const. Corp.,* 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, . . . and other

state and federal courts are not required to accord full faith and credit to such a judgment.") (footnote omitted).

In *Shutts,* the USSC held that the Due Process Clause protects an absent class action plaintiff "even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Shutts,* 472 U.S. at 811, 105 S.Ct. 2965. Thus, in order to provide minimal due process, absent class plaintiffs:

> must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, . . . due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812, 105 S.Ct. 2965 (citations omitted). If the due process requirements of (1) notice; (2) an opportunity to be heard; (3) an opportunity to "opt out"; and (4) adequate representation are met, the foreign court properly asserts personal jurisdiction over the absent class plaintiffs. Accordingly, those plaintiffs who elect not to opt out are bound by the foreign court's judgment.

The law is less settled, however, when the issue is the scope of review of a rendering court's judgment regarding due process in a class action lawsuit. According to respondents, the Court of Appeals for the Ninth Circuit's view on the law is the correct one. In *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004, 120 S.Ct. 497, 145 L.Ed.2d 384 (1999) ("*Epstein III*"), the Ninth Circuit held that **broad** collateral review of the due process requirements for binding absent class members is **not** available. Instead, the extent of collateral review is **limited** to a consideration of "whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 648-49. The *Epstein III* court declared the following:

> Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. . . . Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648 (citations omitted).[5]

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[5] While the specific challenge in *Epstein III* involved adequate representation, the *Epstein III* court made clear that its reasoning

(Continued on following page)

Moreover, the procedural history of *Epstein v. MCA, Inc.* is noteworthy. The initial decision by the Ninth Circuit reversed a district court's ruling which gave full faith and credit to a class action settlement in Delaware. *See Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir.1995) ("*Epstein I*"). The *Epstein I* court held that because the Delaware class action settlement released **exclusively federal claims**, the Delaware state court judgment was not entitled to full faith and credit. The USSC reversed and remanded. *See Matsushita Elec. Indus. Co. v. Epstein, supra.* On remand, a divided panel of the Ninth Circuit held that the Delaware judgment was **not** entitled to full faith and credit because it violated due process based on the inadequacy of the class representation. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir.1997) ("*Epstein II*"). Significantly, the *Epstein II* court rejected Matsushita's argument that the court was limited to reviewing "the **procedures** that Delaware had in place to ensure adequate representation, rather than the adequacy of the representation itself." *Id.* at 1242 (emphasis in original). Thereafter, the Ninth Circuit granted rehearing, and a reconstituted panel[6] withdrew its *Epstein II* opinion and rejected the appellants' contention that the Delaware judgment was not entitled to full faith and credit. *Epstein III, supra.*

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applied to all aspects of the *Shutts* due process requirements. *See Epstein III*, 179 F.3d at 649 ("*Matsushita* itself indicates that broad collateral review of the adequacy of representation **(or of the other due process requirements for binding absent class members)** is not available.") (emphasis added).

[6] The authoring judge of both *Epstein I* and *II* had resigned in the interim.

Thus, the final word from the Ninth Circuit in *Epstein III* was the emphatic statement that "where the certifying court makes a determination of the adequacy of representation in accord with *Shutts,*" this determination is **not** subject to broad collateral review. 179 F.3d at 648.[7] The USSC declined to review *Epstein III. Epstein v. Matsushita Elec. Indus. Co.,* 528 U.S. 1004, 120 S.Ct. 497, 145 L.Ed.2d 384 (1999).

After *Epstein III* was decided, however, the Court of Appeals for the Second Circuit handed down *Stephenson v. Dow Chemical Co.,* 273 F.3d 249 (2nd Cir.2001). Appellants contend that, pursuant to *Stephenson,* a broad collateral attack on the nationwide settlements is permissible.[8]

In *Stephenson,* two Vietnam War veterans brought suit in 1998 and 1999 for injuries based on their exposure to Agent Orange during the war. But in 1984, a global class action settlement had been entered on identical claims. The settlement provided that no payments would be made for death or disability occurring after December

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[7] One judge on the panel dissented, standing by the decision in *Epstein II. Epstein III, supra* (Thomas, J., dissenting).

[8] Appellants also argue that South Carolina precedent supports the proposition that the courts of this state may review the jurisdictional underpinnings of a foreign judgment before granting full faith and credit. *See, e.g., Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.,* 226 S.C. 257, 275, 84 S.E.2d 857, 866 (1954) (where in determining the validity of a Georgia divorce decree, the Court stated: "It is well settled that want of jurisdiction over either the person or the subject matter is **open to inquiry** where a judgment rendered in one state is challenged in another.") (emphasis added). We note, however, that nationwide class action lawsuits clearly raise very particularized due process issues, and we therefore focus our analysis on case law in that context.

31, 1994. The *Stephenson* plaintiffs' conditions had not been diagnosed until 1996 and 1998.

The district court dismissed the *Stephenson* lawsuit finding it was an impermissible collateral attack on the 1984 settlement. On appeal, the plaintiffs argued they were inadequately represented, and therefore, the earlier class action settlement did not preclude their claims. The *Stephenson* court agreed thereby allowing a "broad collateral attack" on the class action settlement. The *Stephenson* court specifically found that the plaintiffs' lawsuit could continue because there had been "no prior adequacy of representation determination with respect to individuals whose claims arise after the depletion of the settlement fund." *Id.* at 258. The court rejected the defendants' reliance on *Epstein III* for "a limited collateral review theory." *Id.* at n. 6. Instead, the court decided that:

> [T]he propriety of a collateral attack such as this is amply supported by precedent. In *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), the Supreme Court entertained a collateral attack on an Illinois state court class action judgment that purported to bind the plaintiffs. The Court held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; *cf. Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) ("[I]t is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.").

Id.

As to the merits of the collateral attack, the *Stephenson* court relied on the USSC's recent decisions in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999),[9] to find that the *Stephenson* plaintiffs had not been adequately represented in the 1984 settlement, and therefore were not bound by it.

The USSC granted certiorari to review *Stephenson.*[10] However, the USSC ultimately issued a per curiam decision which vacated the Second Circuit's opinion as to one set of plaintiffs, and, by an equally divided court, summarily affirmed the decision allowing collateral review as to the other set of plaintiffs. *Dow Chemical Co. v. Stephenson,* 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003) (Stevens, J., not participating).

Thus, it remains an open, and hotly litigated, question as to whether limited collateral review is required on the *Shutts* due process requirements in a class action case (*see Epstein III*), or whether a broader, merits-oriented collateral review is permitted (*see Stephenson*). In addition to the conflict in the federal circuits as exemplified by *Epstein III*

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[9] Both these cases involved **direct appeals** of global class settlements in asbestos litigation.

[10] The two questions at issue on certiorari were whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, and, if collateral attack is permissible, whether the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of changes in the law years after the settlement has become final.

and *Stephenson,* there is also disagreement amongst the state courts[11] and legal scholars.[12]

In our opinion, there are important policy considerations favoring both limited and broad collateral review. Certainly, in the specialized context of class action litigation, the significant interests in efficiency and finality favor limited review. If the due process issues are fully and fairly litigated and necessarily decided by the rendering court, then the strong interest in finality militates in favor

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[11] *Compare Fine v. America Online, Inc.*, 139 Ohio App.3d 133, 743 N.E.2d 416, 420 (2000), *cert. denied*, 532 U.S. 942, 121 S.Ct. 1403, 149 L.Ed.2d 346 (2001) (staunchly following *Epstein III* and stating: "Modern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of appropriate procedures in the certifying court and by the courts that review its determinations.") *with State v. Homeside Lending, Inc.* 826 A.2d 997, 1016-17 (Vt.2003) (recognizing disagreement on whether collateral attack is available on adequate representation, but indicating its inclination "to follow the recent decision of the Second Circuit Court of Appeals in *Stephenson* because adequacy of representation is 'the quintessence of due process in class actions' ") (citation omitted).

[12] *Compare, e.g.*, Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L.Rev. 765, 771 (1998) (critiquing the *Epstein II* decision, and advocating what became the *Epstein III* position that if the initial forum made a finding of adequate representation and employed "fair procedures" in making the finding, then "the substance of the finding itself is not subject to collateral attack.") (hereinafter "Kahan & Silberman") *with* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L.Rev. 383, 388 (2000) ("The argument for limiting collateral attack contradicts two fundamental principles: first, a court has no jurisdiction over absent class members who have not been adequately represented; second, a judgment entered without jurisdiction may be collaterally attacked if the party bound by the judgment did not appear and had no obligation to do so.").

of an extremely limited collateral review. Without limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially. It would seem to be a waste of judicial resources to require reviewing courts to conduct an extensive substantive review when one has already been undertaken in a sister state. As the Ohio court stated in *Fine v. America Online:* "To allow substantive collateral attacks would be counter intuitive to [the] procedural relief that a class-action suit is intended to afford our judicial system nationwide." 743 N.E.2d at 421-22.

On the other hand, there is the fundamental interest in not allowing constitutionally infirm judgments to be enforced. It would be troublesome to enforce a class action settlement against parties over whom the rendering court did not have personal jurisdiction. We note, however, that the view espoused in *Epstein III* envisions that direct appellate review of a class action is the appropriate vehicle to correct whatever errors may have been made at the trial court level.[13]

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[13] We also recognize there exists the concern that a particular state may abuse the class action lawsuit by improperly providing a too-friendly forum for class actions. *See* Kahan & Silberman, 73 N.Y.U. L.Rev. at 775-76 (describing the class action forum shopping problem as "sinister" and observing that "both class counsel and defendant may prefer a forum that rubberstamps any settlement they reach"); *see also State v. Homeside Lending, Inc.*, 826 A.2d at 1020 (where the Vermont Supreme Court noted that for "whatever reason, Alabama has been a magnet forum for national class actions, even when Alabama has no connection with the vast majority of the plaintiffs or with the defendants.").

We hold that in a case such as this one, only a limited collateral review is appropriate. It would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court. Moreover, second-guessing the fully litigated decisions of our sister courts would violate the spirit of full faith and credit. *See Fine v. America Online,* 743 N.E.2d at 421.

Therefore, we concur with the Ninth Circuit's view and find due process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review. As for collateral review, however, due process does not afford any "second-guessing of those determinations." *Epstein III,* 179 F.3d at 648. Instead, what this limited review entails is "an examination of **procedural** due process and nothing more." *Fine v. America Online,* 743 N.E.2d at 421. More specifically, we must determine: (1) whether there were safeguards in place to guarantee sufficient notice and adequate representation; and (2) whether such safeguards were, in fact, applied. *Id.* at 422.

Initially, we note our agreement with the trial court's findings that both the *Spencer* court in Alabama and the *Cox* court in Tennessee actually ruled that the due process requirements had been met. Both these courts specifically found that the respective notice programs met minimal due process. The *Cox* final order stated that the adequacy requirement (in terms of Tennessee's Rule 23) had been met and it had jurisdiction over the parties. The *Spencer* final order found the "settlement fair, adequate and reasonable" to the members of the class.

Accordingly, under a limited collateral review, the two foreign judgments on their face appear to be entitled to full faith and credit. *See, e.g., Epstein III, supra; Fine v. America Online, supra.* Nonetheless, we turn separately to a review of the procedures utilized by the foreign courts to ensure proper notice and adequate representation.

Notice

Some factual background on the notice programs is required.

As noted by the *Cox* court, the notice in *Cox* was "a singularly comprehensive and creative notice program." According to the president of one of the consulting companies hired to provide notice in *Cox,* the program was designed to reach the largest possible number of consumers whose homes contained polybutylene plumbing. Over 5.6 million individual mailed notices were sent; of those, 244,756 were mailed to South Carolina addresses. In addition, there was a toll-free 800 telephone number set up to field questions about the settlement. More than 1 million calls were received, and over 10,000 additional notices were mailed out.

Furthermore, there was an extensive multimedia campaign. For example, between August 21, 1995 and September 3, 1995, a 30-second television spot was aired 213 times on national network and cable television; during September 1995, full page notices appeared in Parade magazine, USA Weekend, USA Today, People magazine, and TV Guide, as well as in 201 daily and weekly newspapers in 13 targeted states (of which South Carolina was one), 38 Hispanic newspapers, and 2 African-American newspapers; on October 3, 1995, a national news conference

was held in Washington, DC, and a press release was sent to 2,000 newspapers, wire services, magazines and broadcast points across the United States; and a World Wide Web home page was created. Statistics as of October 30, 1995, estimated that the media campaign reached over 90% of those Americans over age 25, or exposure to over 150 million people.

Likewise, in *Spencer,* an extensive notice program occurred during August, September and October 1995. Because the DuPont product was sold "more heavily in the Mid-Atlantic and Southeast regions in site-built ('starter') homes, mobile homes, and apartments," the notice program was designed to reach people that fell within this demographic, which was determined to be middle-class, high school educated adults with household incomes of less than $45,000. Over 2.5 million notices were directly mailed to people in 12 states, of which South Carolina was one. The mailing list was generated based on mobile home ownership listings. Over 275,000 phone calls were initially received on the 800 number, and 90,000 additional notices were sent out based on individual requests.

As in *Cox,* there was a multimedia campaign in *Spencer* as well. The notice was published in USA Today, USA Weekend, TV Guide, Jet magazine, Parade magazine, and 66 Spanish-language newspapers. Television and radio commercials were aired; press and video news releases were distributed. The notice program cost $7.4 million.

Regarding the content of the notices, the notices in both *Cox* and *Spencer* explained the terms of the settlement, provided for the opportunity to participate (e.g., by

filing objections and appearing at the fairness hearing), and gave information on how to opt out.

Nonetheless, appellants contend that notice to them as absent class members was constitutionally insufficient. Appellants argue, *inter alia,* that they were entitled to personal notice, rather than by publication. In addition, they maintain that the notice programs were deficient to all class members **other than** mobile home owners and the content of the notice was incomplete.

Without question, due process requires that absent class plaintiffs be given notice. *Shutts, supra.* However, the standard for notice is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts,* 472 U.S. at 812, 105 S.Ct. 2965 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

In the final order approving the class settlement, the *Cox* court made several general findings, and numerous specific findings, related to notice. The *Cox* court characterized the notice program as excellent and found it was the best notice practicable under the circumstances. The court further described the program as one unprecedented in "reach, scope, and effectiveness." Additionally, the *Cox* court used court-appointed class notice providers (two consulting companies), and considered testimony of employees of these companies. The final order extensively details the notice program, highlighting many of the aspects outlined above. The *Cox* court concluded that the notice program "met and exceeded" both minimum due

process requirements and the notice requirements under Tennessee's class action rule.[14]

Clearly, the *Cox* court designed and utilized various procedural safeguards to guarantee sufficient notice under the circumstances. Pursuant to a limited scope of review, we need go no further in deciding the *Cox* court's findings that notice met due process are entitled to deference.

As in *Cox,* the issue of notice was fully litigated in *Spencer.* The *Spencer* court issued an order prior to the implementation of the notice program specifically approving the notice and authorizing the notice program. [15] In the final order approving the class settlement, the *Spencer* court stated that notice was sent "via first class and by means of a massive national media campaign." The court specifically found that the form of notice satisfied both due process requirements and the notice requirements under Alabama's class action rule. The *Spencer* court relied on the affidavit of the consultant who designed the notice program and related the details of the notice program, as discussed above. The court concluded that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the Action and their rights therein."

Accordingly, we hold that under a limited collateral review it is clear there were proper procedures in place to

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[14] We note further that the *Cox* court had been kept apprised of the notice program as it progressed.

[15] This order expressly stated that the court had heard arguments of counsel on the notice issue.

ensure notice in the *Spencer* case complied with minimum due process.

Adequate Representation

Appellants argue full faith and credit should not be accorded to the *Spencer* and *Cox* settlements because adequate representation was lacking. More specifically, appellants argue that conflicts within the class required subclasses; class counsel had impermissible conflicts with class members; and class representatives, as mobile home owners, were inadequate representatives for other types of owners, such as those who own multi-unit structures. Pursuant to a limited review, however, we need merely to determine whether there were safeguards in place to guarantee adequate representation. We conclude that in both *Spencer* and *Cox,* there were the proper procedures present.

Shutts declared that due process "of course requires that the named plaintiff **at all times adequately represent** the interests of the absent class members." 472 U.S. at 812, 105 S.Ct. 2965 (emphasis added).

Recently, the USSC has elaborated on what constitutes adequate representation. In *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), an asbestos litigation case decided **after** the *Spencer* and *Cox* settlements were finalized, the USSC affirmed the Third Circuit's decision to vacate a global class settlement where the federal district court had certified the class for settlement purposes. The *Amchem* class covered plaintiffs who had been exposed to asbestos; the plaintiffs included people who had already manifested personal injury **and** those who had not yet manifested any

affliction; this latter group was labeled the "exposure-only" plaintiffs.

Initially, the *Amchem* court made clear that while settlement is certainly relevant to a trial court's decision to certify a class, the other requirements for certification under Rule 23, Fed.R.Civ.P., must still be given appropriate, and even heightened, attention because they are specifically designed to bind and protect absent class members. *Id.* at 619-21, 117 S.Ct. 2231. The court also clearly stated that the overall fairness of a settlement is no substitute for Rule 23's certification criteria. *Id.* at 622, 117 S.Ct. 2231.[16]

With respect to adequate representation, the *Amchem* court stated that the adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625, 117 S.Ct. 2231. Significantly, a class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26, 117 S.Ct. 2231 (internal quotations and citations omitted). Furthermore, "[t]he adequacy heading also factors in competency and conflicts of class counsel." *Id.* at 626 n. 20, 117 S.Ct. 2231.

On the merits of the adequate representation issue, *Amchem* found serious problems with the global class settlement. First, the named parties had "diverse medical

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[16] *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863-64, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) ("the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)"). The USSC's decision in *Ortiz*, decided two years after *Amchem*, reiterated many of the significant holdings of *Amchem*.

conditions" but nevertheless "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses." *Id.* at 626, 117 S.Ct. 2231. In addition, the USSC found it significant that the currently injured plaintiffs' interest in "generous immediate payments" would be adverse to the exposure – only plaintiffs' interest "in ensuring an ample, inflation – protected fund for the future." *Id.* The *Amchem* court also was troubled by certain terms of the settlement, *to wit,* it included no adjustment for inflation and only a few claimants per year could opt out at the back end. Thus, the court stated the global settlement had "no **structural assurance** of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627, 117 S.Ct. 2231 (emphasis added).

Appellants argue that, pursuant to *Amchem,* there was inadequate representation, and therefore *Spencer* and *Cox* should not be given full faith and credit. Respondents argue that *Amchem* is not appropriately considered on this issue because it involved a direct appeal, rather than a collateral review as in this case. Along the same lines, respondents also contend that *Amchem* cannot be retroactively applied to *Spencer* and *Cox,* both of which were finalized in 1995, when *Amchem* was decided in 1997.

Given our limited scope of review, we need not address the merits of appellants' arguments on adequate representation. In addition, we believe the arguments raised by respondents on *Amchem's* applicability do not require resolution for our limited review. Instead, we find it is patent that both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation. For example, the *Spencer* court made preliminary findings regarding the adequacy of the named plaintiff representatives and the

qualifications of counsel. Moreover, many of appellants' allegations regarding the actions of class counsel were expressly raised at the *Spencer* fairness hearing. Finally, the final order in *Spencer* stated that the settlement was fair, adequate and reasonable to the members of the class. The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class. The court further noted that the $45 million in attorneys' fees represented only approximately 5% of the settlement fund and were not deducted from the settlement fund. The court in *Cox* specifically stated that "the Agreement is the result of good faith, arms-length, and non-collusive negotiations." Finally, we note the *Cox* court also found that the settlement class met the adequacy requirements of Tennessee's class action rule.

We find there obviously were procedures in place to ensure adequate representation in both *Spencer* and *Cox*, and that such procedures were implemented throughout. Accordingly, these court findings survive our limited collateral review. Furthermore, it is important to observe that we agree with the *Fine v. America Online* court's view that "[m]ere disagreement with the terms of a settlement cannot provide grounds for a collateral attack" on a class settlement. 743 N.E.2d at 423.

CONCLUSION

In sum, we find that the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one

limited to a consideration of whether the **procedures** in the prior litigation allowed a full and fair opportunity to litigate the due process issues. It is our opinion that such procedures were not only in place in *Spencer* and *Cox,* but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC.; ASHLEY) INNS, A PARTNERSHIP, D/B/A) HAMPTON INN RIVERVIEW;) BEST WESTERN NAVAL) CENTER, INC., D/B/A) HOLIDAY INN (BEAUFORT);) WILLIAM TAYLOR; CANAL) COURT, II, L.P., AS GENERAL) PARTNER FOR BENTLEY) COURT, II, L.P.; BOYD &) COMPANY; VICTOR APAT,) INDIVIDUALLY AND ON) BEHALF OF R & A PARTNERS;) RICHARD ACKERMAN;) THOMAS BECKMAN; AND) EUGENE CONE,)) Plaintiffs,)) -versus-)) SHELL OIL COMPANY D/B/A) SHELL CHEMICAL) COMPANY, HOECHST) CELANESE CORPORATION,) and E.I. du PONT de NEMOURS) AND COMPANY,)) Defendants.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **ORDER GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the Defendants' renewed Motions for Summary Judgement. The grounds of the motions are that earlier court approved class action settlements are entitled to full faith and credit from this Court, which precludes the Plaintiffs' claims. Upon consideration of

the memoranda and exhibits submitted by the parties, the pleadings, and the reasons set forth herein, the motions are granted.

I.

The Plaintiffs alleged that polybutylene plumbing systems in their residences or commercial properties were defective. Polybutylene plumbing systems are comprised of, among other things, polybutylene pipe and various types of "fittings" – made of different raw materials and different designs – that are used to join the polybutylene pipe. The Defendants are not manufacturers of the component parts of the plumbing, but rather are suppliers of the plastic materials used in some of the different types of polybutylene plumbing.

Prior to 1995, litigation over polybutylene plumbing systems had been pending in many courts around the country for more than a decade. The first purported nationwide polybutylene plumbing class action, ***Beeman v. Shell Oil Co.*** (***"Beeman"***), was filed in Texas state court in September 1993. That followed with other lawsuits filed throughout the country purporting to be statewide or nationwide class actions.[1] With the assistance of a

[1] The ***Beeman*** plaintiffs subsequently dismissed their state court action and refiled their case in the United States District Court for the Southern District of Texas. ***Beeman v. Shell Oil Co.***, No. G-95-214 (S.D. Tex., filed April 18, 1995). Additionally, from late February to early June 1995, class actions were filed in Maryland, Missouri, Illinois, Louisiana, Alabama, California, and New Jersey. In July 1995, the plaintiffs filed a proposed notice program with the Court. On August 16, 1995, the Court entered an Order approving the notice program after considering the pleadings and argument and establishing opt-out or

(Continued on following page)

nationally-known mediator, the ***Beeman*** plaintiffs and the Defendants reached a tentative settlement in October, 1994, but in February, 1995, the Texas court denied preliminary approval of the settlement without hearing any evidence on the fairness of the settlement and without any explanation. Shortly thereafter, other lawsuits were filed against the Defendants throughout the country purporting to be statewide or nationwide class actions.

In November, 1994, a nationwide class action of plaintiffs' filed against Shell, Hoechst Celanese, and DuPont in Greene County, Alabama, a nationwide class action styled ***Spencer v. Shell Oil Co.*** (***"Spencer"***). In May, 1995, DuPont reached a settlement agreement with the ***Spencer*** class plaintiffs, which the Alabama court preliminarily approved after a hearing on May 25, 1995.

In June, 1995, another group of plaintiffs filed ***Cox, et al. v. Shell Oil Co., et al.*** (***"Cox"***) against Celanese and Shell, a national class action in Obion County, Tennessee. After the ***Cox*** court certified a nationwide class, ***Cox*** class counsel joined with the plaintiffs' attorneys in ***Beeman*** to prosecute the ***Cox*** action on behalf of owners of all mobile homes and site-built structures with polybutylene plumbing.

On July 31, 1995, the ***Cox*** and ***Beeman*** plaintiffs, representing the certified national class, provisionally settled with Shell and Celanese. The ***Cox*** court preliminarily approved the proposed settlement and approved the class action settlement notice program. On August 9, 1995,

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objection dates. Each potential class member was given the opportunity to be excluded from the class and/or object to the settlement.

the ***Cox*** court heard arguments from various objectors, including ***Spencer*** class counsel, on, among other things, the adequacy of the proposed notice to the class, the applicable due process requirements, and the adequacy of representation of the class. On August 24, 1995, the ***Cox*** court issued an order preliminarily approving the forms of notice. On August 30, 1995, the ***Cox*** court heard argument and evidence in favor of, and objections to, the notice program, and on September 22, 1995, the court gave final approval to the forms of notice, scheduled a fairness hearing, and set opt-out and objection dates.

The final ***Cox*** settlement was the result of intense negotiations among the ***Cox*** class counsel, ***Spencer*** class counsel, lawyers for other putative classes of plaintiffs, and the Defendants. With the endorsement of the ***Cox*** and ***Spencer*** courts, negotiations took place under the direction of Judge Richard Silver of the Monterey Superior Court, California, who was presiding over still another putative class action brought against the Defendants. Those final negotiations culminated in a $100 million enhancement to the ***Cox*** settlement amount, an expanded period of time during which class members could obtain relief, and an agreement that interest on settlement funds would be deposited for the benefit of the class and not credited against the settlement cap.[2]

In late 1995, following multi-million dollar notice campaigns regarding the proposed settlement, the Tennessee

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[2] The ***Spencer*** plaintiffs, having already settled with DuPont, also settled with Shell and Celanese. Ultimately, DuPont, Shell and Celanese entered into an agreement which enabled the ***Cox*** and ***Spencer*** settlements to be coordinated.

and Alabama courts conducted evidentiary hearings, which were open to all interested parties, on the fairness of the proposed settlements. At their conclusion, the ***Cox*** and ***Spencer*** courts found that the settlements were fair, reasonable, and adequate. On November 17, 1995, both the ***Cox*** and ***Spencer*** courts gave final approval to the settlements, finding that the settlements were fair, adequate and reasonable in all respects.[3]

The Tennessee court issued a final judgment dismissing the national class's claims against Shell and Celanese and barring all members of the nationwide Settlement Class from prosecuting polybutylene plumbing claims against Shell and Celanese in all other forums:

> It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice. . . .
>
> It is further ORDERED that . . . Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of

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[3] Under the ***Cox*** settlement, Celanese and Shell agreed to, among other things, contribute initially up to $950 Million to provide relief to homeowners nationwide, including resident [sic] of South Carolina, with leaking polybutylene plumbing. At the time this Motion was briefed in early 2001, over $830 Million had been spent under the settlement including over $30 Million in South Carolina.

> the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action. . . .

Each individual or entity subject to the ***Cox*** judgment was afforded an opportunity to exclude himself from the class by submitting a written exclusion or "opt out" request before October 20, 1995.

The ***Spencer*** court also issued a final judgment, approved a national class action settlement dismissing the plaintiff's complaints and barring all members of the settlement class from bringing the same claims in other forums, and relieving the Defendants of liability. The ***Spencer*** "opt out" expired on October 27, 1995.

None of the Plaintiffs in this South Carolina action opted out of the ***Cox*** or ***Spencer*** settlements. Therefore, the express terms of the ***Cox*** and ***Spencer*** final judgments bar the Plaintiffs in this action from pursuing these claims against Shell, Celanese, and DuPont, in this or any other court.

II.

The issue here is whether the judgments of the Tennessee court approving the ***Cox*** settlement and the Alabama court approving the ***Spencer*** settlement, which have already been extended full faith and credit by the courts of Alabama, Arizona, Florida and Wisconsin, are also entitled to full faith and credit in this Court. Under controlling Under [sic] States Supreme Court authorities, the ***Cox*** and ***Spencer*** judgments are presumptively entitled to full faith and credit. The grounds on which the Plaintiffs may avoid these judgments are very narrow and subject to only limited collateral review.

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Congress codified the constitutional guarantee of full faith and credit more than two hundred years ago and it remains essentially unchanged today:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. The United States Supreme Court has held consistently that this constitutional mandate means "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." ***Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n***, 455 U.S. 691, 704 (1982); *see also* ***Kremer v. Chemical Constr. Corp.***, 456 U.S. 461, 466 (1982). Thus, under the full faith and credit doctrine, the validity and effect of a foreign judgment is determined by the laws of the state that rendered it.

Full faith and credit principles also extend to questions of jurisdiction. ***Underwriters Nat'l Assurance Co.,*** 455 U.S. at 706. It is axiomatic that a judgment must be supported by proper jurisdiction over the subject matter and over the relevant parties. ***Id.*** at 704-05 n.10. Thus, "one State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction

merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State." ***Id.*** In ***Underwriters***, the Supreme Court prescribed the permissible scope of review in determining whether to grant full faith and credit to another court's judgment, particularly when the rendering court's jurisdiction and authority to enter the judgment are questioned:

> A judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. The [second court], therefore, should have determined in the first instance whether the [original court] fully and fairly considered the question of . . . jurisdiction. . . . If the matter was fully considered and finally determined in the [original] proceedings, the judgment was entitled to full faith and credit in the [second court].

Id. at 706-07 (citing ***Durfee***, 375 U.S. at 111) and at 709 n.16 ("[T]he fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue.").

Decisions by the South Carolina courts are in accord with the above principles. ***See, e.g.***, ***Hamilton v. Patterson***, 236 S.C. 487, 492, 115 S.E.2d 68, 70 (S.C. 1960); ***Taylor v. Taylor***, 229 S.C. 92, 98, 91 S.E.2d 876, 879 (S.C. 1956); ***Gregoire v. Byrd***, 338 S.C. 489, 493-96, 527 S.E.2d 361, 363-65 (S.C. Ct. App. 1999) (reciting constitutional principles of full faith and credit and noting that a foreign judgment is entitled to full faith and credit even as to

questions of jurisdiction); ***Colonial Pac. Leasing Corp. v. Taylor***, 326 S.C. 529, 532-34, 484 S.E.2d 595, 596-97 (S.C. Ct. App. 1997); ***Carson v. Vance***, 326 S.C. 543, 551, 485 S.E.2d 126, 130 (S.C. Ct. App. 1997); ***Nationsbank of North Carolina v. Parsons***, 324 S.C. 506, 512, 477 S.E.2d 735, 738 (S.C. Ct. App. 1996) ("the crux of the Full Faith and Credit Clause of the United States Constitution is that courts of one state must give such force and effect to a judgment of a sister state as that judgment would have in the sister state."); ***Bankers Trust Co. v. Braten***, 317 S.C. 547, 551, 455 S.E.2d 199, 200 (S.C. Ct. App. 1995) ("[A] foreign judgment which is regular on its face generally may not be collaterally attacked."); ***Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping and Gardening Ctr., Inc.***, 315 S.C. 88, 431 S.E.2d 632, 634 (S.C. Ct. App. 1993).

Significantly, the full faith and credit analysis does not change merely because the case involves a class action or a judgment incorporating a class action settlement. In ***Matsushita Elec. Indus. Co. v. Epstein***, 516 U.S. 367 (1996), the Supreme Court held, "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the [Full Faith and Credit] Act." ***Id.*** at 374.

Full faith and credit is a Constitutional guarantee for all judgments, including class action judgments, in which the rendering court had jurisdiction. In the context of a class action, the Supreme Court in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797 (1985), held that a state court properly exercises jurisdiction over non-resident, absent class members by providing them with minimum due process in its own proceeding. In ***Matsushita***, the Supreme

Court confirmed that the issue of whether a state court provided absent class members with the due process required by ***Shutts*** to bind them to its judgment is subject to extremely limited collateral review provided the findings of the rendering court reflect that the court affording an opportunity to litigate the due process issue. The voluminous record on this motion demonstrate [sic] that the ***Cox*** and ***Spencer*** judgment both meet this requirement.

The authority of a state court to exercise jurisdiction over absent class members has been conclusively upheld by the United States Supreme Court. In ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797 (1985), the Court stressed that state courts "may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum" if minimum due process requirements are met. 472 U.S. at 811-12. ***Shutts*** established that minimum due process consisted of: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation. ***Id.***

Matsushita alone would require this Court to limit its review of the ***Cox*** and ***Spencer*** judgments to the due process findings of the respective courts. However, the leading federal case interpreting ***Matsushita*** also confirms that class action judgments are subject only to limited collateral review.

In ***Matsushita***, the Supreme Court reversed a decision by the Ninth Circuit Court of Appeals that denied full faith and credit to a Delaware state court class action judgment. The ***Matsushita*** Court held that the Delaware judgment was entitled to full faith and credit under the United States Constitution notwithstanding the fact that

the judgment released claims within the exclusive jurisdiction of the federal courts. In explaining its reasoning, the Court satisfied itself that the due process requirements of ***Shutts*** had been met by *referencing* the Delaware court's findings on these matters (notice, the opportunity to be heard, and the adequacy of the representation):

> [T]he Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable, and adequate and in the best interests of the . . . Settlement Class" and that notice to the class was "in full compliance with . . . the requirements of due process." . . . The Court of Chancery "further determined that the plaintiffs,. . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class"

Matsushita, 516 U.S. at 378-89. Indeed, for full faith and credit purposes, the Court confined its review of the prior Delaware judgment solely to the Delaware court's findings on the ***Shutts*** elements of due process necessary to bind absent class members. Having confirmed that the Delaware court considered and addressed the relevant due process elements, the Court looked no further on the issue.

The holdings of the Court in ***Matsushita*** are well explained in ***Epstein v. MCA, Inc.***, 179 F.3d 641, 655 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999), in which the Ninth Circuit confirmed the settled rule under the Full Faith and Credit Clause prohibiting "collateral second guessing

of [the rendering court's] determinations." ***Id.*** In ***Epstein***,[4] the plaintiffs claimed that a prior Delaware class action judgment should not be accorded full faith and credit because it violated their due process rights to adequate representation. 179 F.3d at 644. They argued that ***Shutts*** created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." ***Epstein***, 179 F.3d at 647.

The Plaintiffs argue that unlike the ***Epstein*** plaintiffs, they allegedly did not receive actual notice of the prior proceeding and thus did not have an opportunity to participate or appear in the original proceeding. The Plaintiffs miss the issue. In ***Epstein v. MCA, Inc.***, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999), the Ninth Circuit – relying on the Supreme Court's ***Matsushita*** and ***Shutts*** decisions – flatly rejected any notion of broad collateral review of class judgments and held that class members' due process rights are primarily protected by the rendering court and not by collateral review. Whether or not they received actual notice of the ***Cox*** and

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[4] The procedural history of the ***Epstein*** case is important. The Ninth Circuit's original decision in ***Epstein v. MCA, Inc.***, 50 F.3d 644 (9th Cir. 1995), reversed a federal district court ruling and held, among other things, that a Delaware state court judgment was not entitled to full faith and credit. In ***Matsushita***, the Supreme Court reversed the Ninth Circuit's decision and remanded for proceedings consistent with its opinion. On remand, the Ninth Circuit initially held again in ***Epstein v. MCA, Inc.***, 126 F.3d 1235 (9th Cir. 1997), that the Delaware state judgment was not entitled to full faith and credit. On rehearing, however, the Ninth Circuit withdrew its 1997 opinion and issued its final ***Epstein*** decision granting full faith and credit to the Delaware judgment based upon the ***Matsushita*** opinion. (*See* procedural history detailed at 179 F.3d at 642-643).

Spencer proceedings is not determinative of whether a class action judgment is entitled to full faith and credit. The issue is whether the rendering court provided absent class members with the due process required by ***Shutts*** to bind them to its judgment. ***Shutts*** does not require that class notice be actually received, nor do subsequent cases interpret it to impose such a requirement. Due process in the class action context simply does not contemplate or require that each potential class member receive actual notice of the proceeding.

The Plaintiffs claim that the ***Cox*** and ***Spencer*** judgments merely recite that the court had jurisdiction and that ***Williams v. North Carolina***, 325 U.S. 226 (1945) supports their contention that this Court is not bound by such "unsupported recitals in a foreign court's decree." Relying on ***Williams***, the Plaintiffs assert that this Court must make its own determination of whether the Tennessee court had jurisdiction.

In ***Williams***, a judgment of the Supreme Court of North Carolina affirming a conviction for bigamous cohabitation under a North Carolina law, was assailed on the ground that the North Carolina court had improperly denied full faith and credit to a prior divorce decree entered by a trial court in Nevada. ***Williams***, 325 U.S. at 227.[5]

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[5] At the outset, the Supreme Court emphasized that a state's power to grant a divorce, *i.e.*, jurisdiction itself, turned on determining an individual's domicile. ***Id***. at 229. The case is replete with state public policy considerations attendant to the issue of domicile since it affects "personal rights of the deepest significance" and "touches the basic interests of society" such as marriage, divorce, and probate.

Most significantly, the ***Williams*** court found that the domicile issue, *i.e.*, jurisdiction, was not litigated or decided in Nevada. ***Id.*** at 230. In fact, the Court emphasized that if the Nevada court had determined that issue, then it would not be subject to relitigation in North Carolina. ***Id.*** n.6 ("We have not here a situation where a State disregards the adjudication of another State on the issue of domicile squarely litigated in a truly adversary proceeding."). Furthermore, the Court stressed that North Carolina, which was "concerned with the vindication of its own social policy," would not be bound by an "unfounded" recital in the Nevada divorce decree. ***Id.*** at 230. In making its decision, the Court found that under the uncontroverted facts of the case, North Carolina fairly assessed that there was no foundation for the Nevada divorce decree because the individual in question had made no effort or even pretense about changing his domicile to Nevada such that it had jurisdiction to grant the divorce. ***Id.*** at 235-36. As such, the Supreme Court ruled that North Carolina had not erred when it refused to grant full faith and credit to the Nevada divorce decree. Thus, contrary to Plaintiffs' contention, ***Williams*** does not stand for the proposition that this Court or any other court is free to engage in *de novo* review of jurisdictional issues that were litigated and decided by the rendering court.[6]

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[6] The Plaintiffs also assert that ***Peoples Nat'l Bank of Greenville v. Manos Bros., Inc.***, 226 S.C. 257, 84 S.E.2d 857 (1954) supports their claim that this Court may collaterally review the ***Cox*** court's "mere recital" of jurisdiction. However, ***Peoples*** simply represents an application by the South Carolina Supreme Court of the distinction drawn by the United States Supreme Court in ***Williams*** between adjudication of jurisdiction and a mere recital of it.

III.

The Supreme Court does not allow a state court to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the ***Cox*** and ***Spencer*** courts, subject to the limited collateral review allowed by the Supreme Court, and ascertain whether the Tennessee and Alabama courts extended the relevant due process to the nationwide class. The record unmistakably shows that the courts fully considered all due process issues relating to its jurisdiction over absent class members and determined that jurisdiction existed. Thus, the judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

In the leading case of ***Epstein v. MCA, Inc.***, 179 F.3d 641 (9th Cir.), *cert. denied*, 120 S.Ct. 497 (1999),[7] the plaintiffs there claimed that a prior Delaware class action judgment should not be accorded full faith and credit

[7] The procedural history of the ***Epstein*** case is important. The Ninth Circuit's original decision, ***Epstein v. MCA, Inc.***, 50 F.3d 644 (9th Cir. 1995) (***"Epstein I"***), reversed a federal district court ruling and held, among other things, that a Delaware state court judgment was not entitled to full faith and credit. In ***Matsushita***, the Supreme Court reversed the Ninth Circuit's decision in ***Epstein I*** and remanded for proceedings consistent with its opinion. On remand, the Ninth Circuit initially held again in ***Epstein v. MCA, Inc.***, 126 F.3d 1235 (9th Cir. 1997) that the Delaware state judgment was not entitled to full faith and credit. On rehearing, however, the Ninth Circuit withdrew its 1997 opinion and issued its final ***Epstein II*** decision granting full faith and credit to the Delaware judgment based on the Supreme Court's ***Matsushita*** opinion. (*See* procedural history detailed in ***Epstein II***, 179 F.3d at 642-43).

because it violated their due process rights to adequate representation. 179 F.3d at 644. They argued that ***Shutts*** created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." ***Epstein II***, 179 F.3d at 647. The Ninth Circuit strongly disagreed:

> ***Shutts*** does not support the broad collateral review that the Epstein appellants seek. In ***Shutts***, the Court identified various procedural safeguards that are necessary to bind absent class members, including notice, the opportunity to be heard, the opportunity to opt out, and adequate representation. 472 U.S. at 812, 105 S.Ct. 2965. However, nowhere in ***Shutts*** did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with ***Shutts***, this determination is subject to collateral review. ***Shutts*** in fact implies that such review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members. *See id.* at 809, 105 S.Ct. at 2965. Simply put, the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court.

Id. at 648. As such, the court held that "due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review." ***Id.*** Thus, the "extent of collateral review is limited" to consideration of "whether the procedures in

the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." ***Id.*** at 648-49 (citing ***Kremer***, 456 U.S. at 481).[8] The Ninth Circuit confirmed that the limited collateral review "would not . . . include reconsideration of the merits of the claim or issue" and noted that " 'state proceedings need do no more than satisfy *minimum* procedural [due process] requirements . . . in order to qualify for the full faith and credit guaranteed by federal law.' " ***Id.*** at 649 (emphasis added).

The Supreme Court does not allow a state court to undertake broad collateral review of another state court's judgment before affording it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the ***Cox*** and ***Spencer*** courts and ascertain whether the relevant due process issues – reasonable notice, an opportunity to be heard and participate, the right to opt out, and adequate representation – were fully and fairly addressed. *See* ***Underwriter's Nat'l Assurance***, 455 U.S. at 707; ***Shutts***, 472 U.S. 811-12.

Because full faith and credit gives the judgment of a state court "the same credit, validity, and effect in every other court of the United States" as it has in the state where it is pronounced, ***Underwriters Nat'l. Assurance Co.***, 455 U.S. at 704, this Court must accord the earlier judgments the same validity and effect that it would have in their own courts. Just as the ***Fine*** court first looked to

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[8] In ***Kremer*** the Supreme Court clarified that, in the context of full faith and credit, a "full and fair opportunity" to litigate entails nothing more than the procedural requirements of due process. ***Kremer***, 456 U.S. at 482 n.24.

Illinois preclusion law, this Court looks to Tennessee and Alabama law to determine whether the Plaintiff would be precluded from raising their claims in those courts.

Tennessee preclusion law is well-settled. The doctrine of res judicata bars a second suit between the same parties on the same cause of action with respect to all issues which were or could have been brought in the former suit. ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987); ***White v. White***, 876 S.W.2d 837, 55-56 (Tenn. 1994); ***Lien v. Couch***, 993 S.W.2d 53, 55-56 (Tenn. App. 1999).[9] To be successful on a plea of res judicata in Tennessee, a party must show (1) the underlying judgment was rendered by a court of competent jurisdiction, (2) the same parties were involved in both suits, (3) the same cause of action was involved in both suits, and (4) the underlying judgment was on the merits. ***White***, 876 S.W.2d at 839; ***Lien***, 993 S.W.2d at 56.

Here, the ***Cox*** judgment approving the class action settlement is a final order on the merits of the settlement issued by a court of competent jurisdiction over all parties, including absent class members of a certified plaintiff class. The Plaintiff can make no argument that Tennessee courts would regard the ***Cox*** judgment as anything other than a complete bar to the claims they seek to bring in this Court. The ***Cox*** settlement and final judgment terminated the claims against the Defendants in the nationwide class judgement. The law of Alabama is the same. ***Carlton v.***

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[9] The doctrine of collateral estoppel bars the same parties or their privies from relitigating in a second suit issues that were actually litigated and determined in a former suit. ***Massengill***, 738 S.W.2d at 631.

Owens, 443 So. 2nd 1227 (1983); ***Beverly v. Owens***, 494 SO. 2nd GS (1986); ***French v. Steel, Inc.***, 445 SO 2nd 561 (1984); ***Imperial Crown Marketing Corp v. Wright***, 560 SO 2nd 1025 (1989).

IV.

The only remaining step in the full faith and credit analysis is for this Court to evaluate, subject to the limited collateral review allowed by the Supreme Court, whether the Tennessee and Alabama courts extended the requisite due process to the nationwide ***Cox*** and ***Spencer*** class. As set forth below, this Court finds that the ***Cox*** and ***Spencer*** judgments were fully litigated and decided – after several adversarial proceedings and on a voluminous record – by the respective Tennessee and Alabama Courts.

(A)

The issue of subject matter jurisdiction was fully contested, briefed, and argued before being finally decided by the ***Cox*** and ***Spencer*** courts. For example, on August 22, 1995, the ***Cox*** court issued a reasoned and thorough order rejecting a subject matter jurisdiction challenge: "[v]arious intervenors have filed motions attacking the subject matter jurisdiction of this Court. The Court has considered the motions, oral arguments and briefs submitted by the parties, and finds the motions are without merit." Therefore, the issue of subject matter jurisdiction was fully litigated and finally decided by the rendering courts.

Similarly, the issue of personal jurisdiction was addressed and determined by the ***Cox*** and ***Spencer*** courts. In its final order, the ***Cox*** court ruled that "the

Court has jurisdiction over all claims asserted in the Action on behalf of . . . all members of the Settlement Class." Therefore, the issue of personal jurisdiction was fully litigated and finally decided by the rendering courts.

As noted above, the United States Supreme Court in ***Shutts*** established the minimum due process required to confer personal jurisdiction over absent class members and bind them to a resulting judgment: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation of absent class members. ***Shutts***, 472 U.S. at 811-12.

The record demonstrates that the respective courts fully considered all due process issues relating to its exercise of jurisdiction over absent class members and determined that jurisdiction existed. Thus, the ***Cox*** and ***Spencer*** judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

The Supreme Court in ***Shutts*** delineated the "reasonable notice" to class members necessary to comport with due process. "The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " ***Shutts***, 472 U.S. at 812 (citing ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 314-315 (1950) and ***Eisen v. Carlisle & Jacquelin***, 417 U.S. 156, 174-75 (1974)); *see also* Fed. R. Civ. P. 23(c)(2) (in class actions, "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). Moreover, "the notice

should describe the action and the plaintiffs' rights in it." ***Shutts***, 472 U.S. at 812.

Following extensive hearings on the matter, the ***Cox*** and ***Spencer*** courts considered the adequacy of the notice of the settlement, they separately and ultimately concluded that the notice campaign exceeded the minimum standards of due process. Class counsel, in both cases, enlisted the aid of marketing and advertising professionals who had extensive experience in designing and implementing successful, court-approved notice programs in a variety of significant class actions, including the ***Domestic Air Transportation Antitrust Litigation***, ***Silicone Gel Breast Implant Litigation***, ***Roberts v. Bausch & Lomb***, ***In re Exxon Valdez Oil Spill Litigation***, ***Johnson v. Nissan Motors Corp.***, and ***School Asbestos Litigation*** cases. In fact, the ***Cox*** and ***Spencer*** courts found that the respective notice campaigns were more comprehensive in design and scope than other class action notice programs which have been successfully used in similar large consumer and product liability actions.

The notice programs encompassed separate components: (1) "paid advertising" (*e.g.* national network and cable television, national consumer publications, and daily and weekly newspapers and magazines); (2) "direct mail" (*e.g.* notice packages mailed to all identified or reasonably identifiable class members, as well as notice packages with more detailed information sent to potential class members who identified themselves by responding via written request or by calling the toll-free number); and (3) "earned media" (*e.g.* press conferences, press releases, articles, and other materials prepared especially for print and electronic distribution and targeted towards consumer affairs reports).

Notices on network and cable television and in national publications were distributed in all 50 states, including South Carolina. Additional advertising was undertaken specifically in South Carolina. In fact, South Carolina was one of the states specifically targeted by the notice experts. Notices appeared in numerous daily, weekly, and monthly newspapers in South Carolina with a combined circulation that exceeded 800,000 persons. The publications included the *Post and Courier*, the *Independent Mail*, *The State*, and the Florence *Morning News*, in addition to the national publications with wide distribution in South Carolina such as both *People* and *Parade* magazines. Individual notices were mailed to over 244,756 South Carolina property owners. Packets were mailed to persons with South Carolina addresses in response to their phoning an 800 telephone number for information on the proposed settlement.

At the fairness hearings, professional class notice providers and media experts testified about the enormous efforts undertaken to notify potential class members of the proposed settlements.

The ***Cox*** and ***Spencer*** courts having [sic] determined that the notices met the requirements of due process, under ***Matsushita*** and ***Epstein II***. The Plaintiffs should not [sic] permitted to relitigate the issue by bringing this lawsuit. As the court in ***Epstein II*** wrote, "***Matsushita*** itself indicated that broad collateral review of the adequacy of representation (*or of the other due process requirements for binding absent class members*) is not available." 179 F.3d at 649 (emphasis added). Rather, collateral review is limited to determining whether the procedures followed in the prior litigation resulted in a "full and fair opportunity" to litigate the issues. In ***Cox*** and ***Spencer*** there were

opportunities for interested parties to contest the adequacy of the notice, and the court findings regarding the adequacy of the notice are not subject to further collateral attack.

Neither the ***Cox*** and [sic] ***Spencer*** notice programs violated the Plaintiff's due process rights because individual notices were not mailed to all class members. Individual notice is not necessarily required to meet the requirements of due process. The multi-media notice campaign designed for these cases represented the "best practicable" notice. Not all Settlement Class members were known or readily identifiable. The Plaintiffs should not be allowed to base this claim that individual notice is required.

(B)

In ***Shutts*** the Supreme Court held only that "[t]he notice must be the *best practicable* and reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Shutts***, 472 U.S. at 812 (emphasis added). Thus, the ***Shutts*** court implicitly acknowledged that individual notice to every putative class member may not always be possible. Likewise, the South Carolina Supreme Court has held that publication alone is sufficient under South Carolina Rule of Civil Procedure 23 and under state and federal constitutional guidelines if there is "no way personally to notify many of the class members." ***South Carolina Pub. Serv. Auth. v. Citizens & Southern Nat'l Bank of S.C.***, 300 S.C. 142, 158, 386 S.E.2d 775, 785 (S.C. 1989) (a post-***Shutts*** decision); ***Premium Inv. Corp. v. Green***, 283 S.C. 464,

475, 324 S.E.2d 72, 78 (S.C. Ct. App. 1989) (a post-***Shutts*** decision).

The case law supports the conclusion that under ***Shutts*** there is no requirement of individual notice where such notice is not practical or reasonable under the circumstances. In ***In re Domestic Air Transp. Antitrust Litig.***, 141 F.R.D. at 539. In ***In Re Agent Orange Prod. Liab. Litig.***, 818 F.2d 145, 168-69 (2d Cir. 1987), the Second Circuit rejected the argument that all 2.4 million Vietnam veterans potentially exposed to Agent Orange must receive individual letter notice of a pending class action.

Other courts have also concluded that individual notice is not required for a notice to be adequate, except when class members can be readily identified. *See, e.g.*, ***Fry v. Hayt, Hayt & Landau***, 198 F.R.D. 461, 474 (E.D. Pa. 2000) (citing ***Eisen*** and ***Mullane*** and concluding that individual notice to class members is only required when the plaintiff knows or can easily determine names and addresses through reasonable efforts; for all others, notice by publication suffices under Rule 23 and the due process clause); ***US West, Inc. v. Business Discount Plan, Inc.***, 196 F.R.D. 576, 582 (D. Colo. 2000) (individual notice is mandatory for class members who can be identified through reasonable effort); ***Carlough v. Amchem Prod.***, 158 F.R.D. 314, 321-23 (E.D. Pa. 1993) (approving a multimedia class notice program involving a toll-free phone number, paid advertising in national publications, television ads, unpaid advertising via public service announcements and press releases for potential class members whose names and addresses could not be ascertained through other reasonable efforts).

The ***Cox*** and ***Spencer*** courts analyzed the circumstances and determined that not all Settlement Class members were readily identifiable. Having drawn that conclusion, the courts considered the available options and reasonably concluded in its discretion that the campaign designed by experienced class notice experts complied with the ***Shutts*** standard of giving "the best notice practicable under the circumstances . . . to members of the Settlement Class."

> Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g.*, ***In re Domestic Air Transportation Antitrust Litigation***, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); ***In re Silicone Gel Breast Implant Products Liability Litigation***, MDL 926 (N.D. Ala. 1994); ***Roberts v. Bausch & Lomb, Inc.***, 94-C-1144-W (N.D. Ala. 1995).

The ***Spencer*** considered the notice program and concluded

> Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated under all the circumstances to apprise interested parties. . . .

(C)

The record clearly reveals that the ***Cox*** and ***Spencer*** courts carefully considered the issue of how to best provide

notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court, and the Plaintiffs' argument provides no basis for denying full faith and credit to the ***Cox*** or ***Spencer*** judgments.

Shutts does not require that notice be actually received, nor do subsequent cases interpret it to contain such a requirement. In ***Silber v. Mabon***, 18 F.3d 1449 (9th Cir. 1994), the Ninth Circuit addressed whether an absent member of a securities litigation class was denied due process because he never received actual notice of the class action. The absent member, Argyris, argued that ***Shutts*** not only requires that notice must be given, but also that the absent class member must actually receive the notice. ***Id.*** at 1451. The ***Silber*** court explicitly rejected this argument, holding that Argyris was not denied due process, particularly under the standard articulated in ***Shutts***:

> We do not believe that ***Shutts*** changes the traditional standard for class notice from "best practicable" to "actually received" notice. No Rule 23(b)(3) case has so construed ***Shutts***. ***Shutts*** was concerned with the different problem of implied consent to jurisdiction when a class member fails to opt out of the class. Even so, the notice obligation was defined by reference to ***Mullane*** and ***Eisen***, neither of which requires actual receipt.

Id. at 1454. As the ***Silber*** court noted, "[m]ost post-***Shutts*** opinions dealing with the constitutionality of class-notice procedures under Rule 23 fail to mention it, and all continue

to uphold the validity of the notice procedures" utilized before the ***Shutts*** case was decided (*i.e.* actual receipt of notice not required). ***Id.*** at n.3; *see also* ***Fry***, 198 F.R.D. at 474 ("due process does not require that every class member receive actual [individual] notice, and, therefore, failure to receive notice is not fatal to the [notice] plan"); ***In re Prudential Ins. Co. of Am. Sales Practices Litig.***, 177 F.R.D. 216, 230-33 (D.N.J. 1997) (rejecting argument that failure to receive individual notice means notice by publication violates due process and the requirements of Rule 23 and noting that "due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties"); ***In re Prudential Sec. Ltd. Partnerships Litig.***, 164 F.R.D. 362, 368 (S.D.N.Y.) ("for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected"), *aff'd without opinion*, 107 F.3d 3 (2d Cir. 1996); ***Gross v. Barnett Banks, Inc.***, 934 F. Supp. 1340, 1344-45 (M.D. Fla. 1995) (rejecting absent class member's argument that notice violated due process because she did not actually receive notice mailed to her former address); ***Weigner v. City of New York***, 852 F.2d 646, 649 (2d Cir. 1988) ("[t]he proper inquiry is whether [one] acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice"), *cert. denied*, 488 U.S. 1005 (1989); ***In re Prudential Sec. Ltd. Partnerships Litig.***, 947 F. Supp. 750, 755-56 (S.D.N.Y. 1996) ("a class action settlement is binding on an absent class member if the notice program is procedurally adequate, even if the absent class member does not receive personal written notice").

The second procedural safeguard enumerated in ***Shutts*** is an opportunity by putative class members to be heard and participate in the litigation. 472 U.S. at 812. The findings demonstrate conclusively that this requirement was met. Potential class members were notified of the hearing and their right to participate. Both notices contained clear information.

Accordingly, this element of due process was clearly met.

> Due process also requires that an absent plaintiff be given an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. ***Shutts***, 472 U.S. at 810-11. Because the classes were certified as "voluntary" or "opt out" classes, each class member was given the unequivocal right to exclude himself from the class.

The notice advised class members of their right to opt out as well as the procedures and deadline for doing so. In addition, the notice advised class members of the consequences of failing to opt out. In their Final Orders, the ***Cox*** and ***Spencer*** courts confirmed that "[t]he members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class."

(D)

The Plaintiffs allege there was inadequate representation of the national class by both class counsel and the named class representatives. The Plaintiffs assert primarily that (1) "disabling conflicts" existed between class counsel and class members such that class counsel's

representation was inadequate; (2) class counsel conducted themselves improperly; and (3) the named plaintiffs could not adequately represent all potential claimants such that the use of subclasses was required.

By filing this suit, the Plaintiffs now urge the Court to make an independent evaluation of the adequacy of representation. However, ***Matsushita*** makes clear that "broad collateral review of the adequacy of representation . . . is not available." ***Epstein II***, 179 F.3d at 649. Rather, the issue is determined by reviewing the findings of the court rendering the judgment. ***Id.*** In this case the courts found that the adequacy requirement under those states rules were satisfied. Under ***Matsushita*** and ***Epstein II*** no "second-guessing" of that determination is allowed. ***Id.*** at 648.

Plaintiffs contend that the ***Cox*** and ***Spencer*** judgments must fail even if ***Epstein III*** and ***Matsushita*** mean that a subsequent reviewing court must limit its review to the issue of determining whether the rendering court applied procedures that reasonably ensured due process to class members. In general, Plaintiffs' complaints relate either to the adequacy (or manner) of the notices or the substantive content of the notices. They argue that the courts did not fully and fairly decide the relevant due process issues such that it did not have jurisdiction over them and therefore, its judgment cannot be granted full faith and credit.

The court disagrees. As the Defendants have demonstrated, there was ample opportunity for interested parties to contest the adequacy and content of the class notice, and the courts' findings are not subject to collateral attack

in this Court. The relevant due process issues were fully and fairly litigated and are not subject to relitigation here.

The Plaintiffs may argue that ***Cox*** and ***Spencer*** class counsel suffered a "disabling conflict of interest" because they were allegedly more concerned about their fees than the interests of the class. This is the same argument that the rival Epstein appellants advanced in ***Epstein II*** and that the Ninth Circuit held was precluded by the Delaware Chancery Court's findings that the Delaware plaintiffs adequately represented the class. The same result should obtain herein.

The conduct of class counsel was overseen by not one, but two courts. In addition, acting as a settlement judge, Judge Richard Silver of the Monterey Superior Court in California actively supervised the negotiations among ***Cox*** counsel, ***Spencer*** counsel, and the Defendants. In that capacity he was specifically alert to the possibility of conflict between class counsel and the class over the subject of attorneys fees. In his November 8, 1995 report he wrote:

> Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this essential to insure that the resolution of the differences did not turn on attorneys fees. . . .
>
> * * *
>
> Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

Under ***Matsushita*** and ***Epstein II*** these findings completely answer any argument about an alleged conflict of interest.

The Settlement Agreement were [sic] reached as the result of good faith, arms' length and non-collusive negotiations. The court heard testimony on every aspect of the Settlement Agreement. These aspects had been the "subject of intense preparation and negotiation, from the amounts, to the terms, to the amount of leaks, to who was covered, to how long they would be covered, [all] was gone over in detail" in arms-length negotiations. Moreover, as noted previously, the settlement that ultimately emerged was the culmination of a two-week settlement conference overseen by Judge Silver in which numerous enhancements to the original settlement were achieved for the benefit of the class. Judge Silver's own report verifies that class counsel conducted themselves properly and that no extraneous elements – such as attorneys fees or class counsel's individual cases – affected the negotiation of the class settlement.[10]

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[10] With respect to the claim that one of the ***Spencer*** class counsel suffered a "disabling conflict" by virtue of his simultaneous settlement of his individual cases, Judge Silver wrote,

> I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be

(Continued on following page)

In its Final Order the ***Cox*** court also found that, "[t]he ***Cox*** Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case."

Any challenge to the adequacy of representation in ***Cox*** would be analogous to the challenge to representation mounted by the appellants in ***Epstein II***. In such instances, the "challenge to the adequacy of representation in the [initial] proceedings [is] answered *by specific reference to the findings made on the issue in those proceedings.*" ***Epstein II***, 179 F.3d at 650. Thus, the courts' findings clearly are dispositive on this issue.

Plaintiffs complain at length that the ***Cox*** notice did not disclose (1) a $30 million fee payment to ***Spencer*** class counsel, (2) the assignment of the ***Spencer*** settlement proceeds to the ***Cox*** fund, which allegedly reduced the value of the ***Cox*** settlement, and (3) the resulting alleged conflicts of interest. Similar, if not identical, complaints were raised by an objector to the ***Cox*** settlement, and was addressed by that court. The ***Cox*** court specifically stated that it considered *all* objections to the ***Cox*** Settlement:

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improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

Similarly, the ***Cox*** court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the ***Cox*** settlement." (Ex. 2 at p. 18, ¶ 66). Inasmuch as the specific issue was fully and fairly litigated in ***Cox***, it may not be relitigated here. ***Epstein II***, 179 F.3d at 648-49.

> In independently determining to approve the Settlement and the Application [for fees], the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

The Court rejected objections relating to the ***Spencer*** assignment and the alleged effect payment of attorneys' fees to ***Spencer*** counsel would have on the ***Cox*** fund:

> Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against DuPont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement. . . .
>
> The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against DuPont and others to defendants Shell and Celanese.
>
> Objectors are incorrect in asserting that the 'credit' arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against DuPont, regardless of whether DuPont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

Because the various arguments and objections relating to the ***Spencer*** settlement and fee payment were fully

and fairly considered and litigated in the ***Cox*** court, they are not subject to relitigation in this Court and cannot form any basis for denying full faith and credit to the ***Cox*** judgment.

The Plaintiffs argue that under the Supreme Court's decision in ***Amchem Products, Inc. v Windsor***, 521 U.S. 591 (1997), the class representatives could not adequately represent the whole class. The class should not have been divided into sub-classes each with its own representative. For several reasons ***Amchem*** presents no bar to extending full faith and credit to the ***Cox*** and ***Spencer*** judgments.

First, ***Amchem*** was not decided until more than 18 months *after* the rendition of the final judgments in ***Cox*** and ***Spencer***. Accordingly, it has no legal effect on the final judgments. Moreover, even if the judgments were deemed erroneous in any respect on account of the subsequent decision in ***Amchem***, they nonetheless are entitled to full faith and credit under the Constitution. *See* ***Lops v. Lops***, 140 F.3d 927, (11th Cir. 1998) (noting that, under full faith and credit, judgments generally should be respected even when erroneous); ***Brady, Texas, Municipal Gas Corp. v. City of Brady***, 936 F.2d 212, 220-21 (5th Cir. 1991) (erroneous state court judgment entitled to full faith and credit because it would be valid in rendering state); ***Turnbow v. Pacific Mut. Life Ins. Co.***, 934 F.2d 1100, 1103-04 (9th Cir. 1991); ***Berry v. Demers***, 1995 WL 406091 at *7 (S.D.N.Y. 1995) ("the full faith and credit statute contains no exception for erroneous decisions").

Second, ***Amchem*** was a direct appeal from a judgment approving a class settlement. ***Amchem*** therefore provides no guidance to a court hearing a collateral attack on a judgment approving a class settlement. Rather,

Matsushita and ***Epstein II*** are the controlling authorities on collateral review. That determination is for the court rendering the judgment and to those courts to which a direct appeal from the judgment lies. Under ***Matsushita*** and ***Epstein II*** that determination is not subject to "second-guessing."

Third, there was not present in these settlements the conflict of interest between class members who had already suffered damage and those who might do so in the future, that led the Court in ***Amchem*** to require the use of subclasses. In ***Amchem*** the Court found that a conflict of interest existed between the named plaintiffs, who had already contracted asbestos-related diseases, and those class members who had been exposed but who had not yet exhibited symptoms of disease ("exposure only" plaintiffs). 521 U.S. at 627-28. The class settlement in ***Amchem*** provided for payments in a fixed range for various categories of illnesses without any adjustment for future inflation. The settlement also capped the number of claims payable in each category in a given year and limited the number of opt outs in future years. ***Id.*** at 626-27. The Supreme Court agreed with the Third Circuit that this created an irreconcilable conflict between the currently injured, whose primary interest would be generous immediate payments, and those only exposed but who had yet to suffer any injury, who would be more interested in assuming an ample inflation-protected fund for the future. ***Id.*** at 626.

The ***Cox*** and ***Spencer*** settlements create no such conflict. There is no cap on the number of claims payable. Moreover, the $950 million settlement amount represents only a *minimum* contribution (*i.e.*, the fund may grow if the number of claims so requires). Inflation is not an issue:

future eligible claimants are entitled to relief. The ***Cox*** settlement provides for renoticing the class every three years in the future and a corresponding right of future homeowners to opt out. The ***Spencer*** settlement provides similarly. Because future claimants were not prejudiced at all in these settlements, there was no antagonism within the class such that the named class representatives could not adequately represent the whole class.

IV.

For the reasons set forth above this Court must extend full faith and credit to the ***Cox*** and ***Spencer*** judgments. Once that is done, the Plaintiffs' claims in this case are barred. Therefore the Defendants are entitled as a matter of law to a judgment dismissing the Plaintiffs' claims with prejudice, and

IT IS SO ORDERED

/s/ _____
The Honorable
R. Markley Dennis, Jr.
Presiding Judge of the
Ninth Judicial Circuit

Moncks Corner, South Carolina
Dated: June 14, 2002

28 U.S.C.A. § 1738

1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United State, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken

an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al., Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants. (formerly HOWARD v. SHELL)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIVIL ACTION NO. 95-CP-10-1948 **AFFIDAVIT OF THOMAS C. BELLINO, JR.**

I, Thomas C. Bellino, Jr., after being duly sworn, state as follows:

* * *

Since 1989, I have participated in the construction of well over two hundred (200) single family dwellings. Almost all of these buildings were constructed with polybutylene plumbing systems. Additionally, I am married to Tammy S. McCutcheon, who is the owner of three (3) dwellings containing polybutylene plumbing systems. Our primary residence located at 1358 Hidden Lakes Drive, Mt. Pleasant, South Carolina, being a twenty-eight hundred, fifty (2,850) square foot single family residence contains polybutylene plumbing. My wife also owns two (2) rental units, 1123 Aster Drive, Mt. Pleasant, South Carolina being an eleven hundred (1,100) square foot family residence, and 454 St. Charles Place, Charleston, South Carolina, being a one thousand (1,000) square foot townhouse, both of which contain polybutylene plumbing systems.

The State of South Carolina through the Department of Labor, Licensing, and Regulation Board, maintains a list of all licensed contractors in the state of South Carolina. The list of licensed contractors is published yearly in several volumes and distributed to towns and various other interested parties for a nominal fee. I have been listed in this publication since my licensing in 1989. Mailing lists are available from the Department of Labor, Licensing, and Regulation Board as well.

Despite the fact that the names, addresses and phone numbers of all licensed contractors are readily available through the state, I have never received any notice of any class action regarding polybutylene piping systems. Although recently I have heard, through word of mouth, that such a class action existed, I have never seen in any media any such notice. Specifically, I have never seen any television advertisement, never heard any radio advertisement, or seen any printed advertisement regarding the existence of a class action, the settlement thereof, or the ability to opt out of the class action. I have not seen in any trade publication, and have not been mailed any notice indicating the existence of the class action.

I have never been asked to notify any of the owners of the residences which I have constructed of the existence of the class action, and have never received any ability to opt out of the class action. My wife, Tammy S. McCutcheon, who is the owner of three (3) units containing polybutylene plumbing systems, has never received any such notice.

I have recently been informed of the existence of a class action in Tennessee purporting to have nationwide affect, and have further been informed that the ability to opt out of this purported class action was a short period

during September and October of 1995. Although I was actively engaged in installing polybutylene plumbing systems in houses which I was building at the time, I never received any notice concerning the class action or the ability to opt out. Consequently, I could not inform home buyers at the time or after that time about the polybutylene plumbing systems.

I understand that a media campaign was supposedly conducted with respect to a notice of a class action. Although my wife and I certainly fall into the demographic group targeted, we were not reached by any notice of the class action. In my opinion as a licensed contractor engaged in construction of dwellings containing polybutylene systems, the best and most practical method of getting notice to the owners of such units is by obtaining information through the plumbing supply houses and the South Carolina Labor, License, and Regulation Board. Each time polybutylene pipe is ordered and billed out by the plumbing supply houses, all of whom keep computer records to my knowledge, the plumbing supply houses generate bills which indicate not only the contractor or plumbing contractor, but also the address and sometimes the owner of the unit. This is done in order to differentiate which jobs and which units the plumbing is being sold for in order that financial records can be kept with respect to each unit. This information is readily obtainable from plumbing supply houses, and would indicate where polybutylene was installed.

Another notice method which would produce great success would be to obtain a mailing list from the South Carolina Labor, Licensing, and Regulation Board for all licensed contractors in the state of South Carolina. Had I received a request for information from polybutylene pipe

manufacturers, I would have easily been able to provide a list of the location [sic] of each home built by any of the companies for which I worked, and the initial purchaser of the home. Having worked for numerous general contractors, it is my opinion that all contractors would keep such information which would be readily available. In that manner, either through the plumbing supply houses, or through the contractors, or a combination of both, it is my opinion that almost all units containing polybutylene pipe systems could be identified.

There is a small number of large tract home builders which have built subdivisions, apartment complexes and other large scale developments in South Carolina. Some of these builders include Centex Homes, John Wieland Homes, and Don Galloway Homes. These large scale tract builders maintain records of addresses and names of the purchasers of units, and could also provide homeowners association addresses which would provide current owners of the units with polybutylene. Some of these tract builders have built thousands and perhaps hundreds of thousands of units containing polybutylene. Therefore, a large portion of the units containing polybutylene pipe could be ascertained by contacting just a few large scale developers/contractors and/or the homeowners associations for the developments. To my knowledge, none of this notification process was ever undertaken by the polybutylene group.

It is my opinion that the method of notification undertaken, being media notice, is not the best, and is probably one of the least effective methods of notification of this type [sic] problem. For many units which are built on slabs, it would be impossible to ascertain the type of pipe without contacting the builder. For a number of units that have exposed plumbing under sinks and near hot water heaters,

plumbing contractors used copper from the sink or water heater to the interior of the wall where it is connected to polybutylene, which is the primary plumbing system of the unit. An unskilled homeowner looking at such pipe would think that they have copper pipe in the house when they really had polybutylene.

In summary, I am engaged in the construction business and have utilized polybutylene plumbing systems as primary systems in over two hundred (200) dwellings since 1989. My wife is the owner of three (3) such units currently. I have never received notice in any form of the Tennessee class action or the ability to opt out of the Tennessee class action, until I was contacted by members of the suit pending in South Carolina within the last few months. It is my opinion that the notification method used by the polybutylene group was ineffective. The best method available, utilizing the plumbing supply houses and the contractors to ascertain and provide actual notice to people with the systems, was not utilized.

FURTHER DEPONENT SAYETH NOT.

/s/

THOMAS C. BELLINO, JR.

SWORN to before me this
17th day of November, 1997.

NOTARY PUBLIC FOR SOUTH CAROLINA

/s/

My Commission Exp.: 1/14/98

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC., et al.,)) Plaintiffs,)) vs.)) SHELL OIL COMPANY, et al.,)) Defendant.)) (formerly HOWARD v. SHELL))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 95-CP-10-1948 **AFFIDAVIT OF MICHAEL S. BRUSSEAU**

I, Michael S. Brusseau, after being duly sworn, states [sic] as follows:

* * *

I am employed as the Maintenance Supervisor for Paces Watch Apartment Community, located at 997 Highway 17 Bypass, Mt. Pleasant, South Carolina.

* * *

There are two hundred thirty-five (235) units in Paces Watch, including the club house and maintenance facility. During the entire time I have worked at Paces Watch, we have had a horrendous experience with leaks from polybutylene piping. A majority of the units in Paces Watch have experienced leaks, numbering over one hundred eighty (180) different leaks to date. Most of the leaks have occurred in the utility closets which house the air conditioning/heating units and hot water heaters. Most leaks occurred in the couplings attaching the pipe, although some leaks occurred in the pipes themselves, which cracked. Most of the leaks occurred near hot water heaters and most leaks occurred behind sheetrock in either the

walls or ceilings. A fair number of leaks occurred in pipes near sinks and toilets.

As a result of the leaks, we have had damage to numerous places in the wallboard and the leaks also damaged property of tenants. One particular leak in the clubhouse knocked out the security system for the entire complex, causing problems with many of the tenants. On several occasions, we had to prorate a tenant's rent for the inconvenience caused by the repairs of polybutylene leaks.

In November, 1995 I went to visit my sister in Wilton, New Hampshire during my vacation. I happened to see on television an 800 number dealing with polybutylene plumbing problems. I called my office in South Carolina and left myself a message with the number. When I got back to South Carolina, I called the number, which turned out to be the number for a company called the Plumbing Claims Group, Inc. (PCG), located in Plano, Texas. The PCG operator told me to contact Crawford and Company, a local adjusting firm, who was the only authorized representative of PCG in this area, and gave me their number. PCG also sent a pamphlet to me about PCG, along with a color sheet detailing various kinds of couplings and pipes. I now know that the PCG was a voluntary claims facility put together by some of the polybutylene manufacturers.

I contacted Crawford and Company and left my name and number. An adjuster named Tom Dale contacted me, and I told him about the numerous leaks and extensive damage we had had from polybutylene leaks. I discussed with him not only the leaks at Paces Watch, but also the leaks at other Apartment Communities owned by the same company, such as Paces Run located in Columbia, South Carolina, which were having similar problems. While

working with Mr. Dale, I forwarded numerous pictures and did extensive research into the timing of the various leaks, the damage caused by the leaks, and the repairs made. I discussed the claim with Mr. Dale after he received and reviewed these materials, and he assured me that everything was fine and that he had all the information he needed, which had been forwarded to PCG in Texas. Mr. Dale, who represented PCG, told me that a number of apartment complexes with fewer leaks and less damage had been totally replumbed. He assured me that all of our damages would be covered and that Paces Watch would be eligible for a complete replumb of over two hundred (200) of its units. Mr. Dale even indicated that the estimated cost of the replumb was about $800,000.00. He further assured me that the claim was complete and being processed in Texas.

In February, 1996, I received a letter from the Consumer Plumbing Recovery Center (CPRC), which I did not understand, which appeared to request resubmission of the claim on a form included with the letter entitled "Claim Eligibility Form." The letter stated that CPRC "took over the operations" of PCG as of January 1, 1996. I immediately called Mr. Dale, and he reassured me that the claim was complete, and not to resubmit anything. Later, in June, 1996, I received another request for the submission of the same "Claim Eligibility Form." I called Mr. Dale again and he told me again that I did not have to do anything, but if I wanted to, I could fill out the front of the form and refer to the materials already submitted, which I did, by the end of June, 1996.

On August 26, 1996, I received a call from another adjuster at Crawford and Company, named H.C. "Chuck" Herring, Jr. Mr. Herring told me that Mr. Dale would no

longer be handling the claim. Mr. Herring told me that the "rules had changed" for the claims and that there were different criteria for leaks which would qualify units for replumbing and expense reimbursement. He told me that Mr. Dale had filed the claim incorrectly, that our file was lost, and that we would have to start from scratch with the claim. As I stated, I had been assured and reassured for over five (5) months that our claim was complete, and was being processed for a complete replumb.

For the first time in the process, Mr. Herring indicated that various filing deadlines and other deadlines had been imposed, and I later found out that August 21, 1996 was one deadline. Conveniently, Mr. Herring did not call me until after the deadline to indicate that our claim was incorrectly file [sic] by his company. I was *not* told that any class action lawsuit had been filed or settled, or that we had any right to opt out of the process. In fact, the first indication I received that any lawsuit existed was the letter dated February 6, 1996 from the CPRC, which I had not heard of until the letter. The letter stated that a class action lawsuit had been finalized, that our PCG claim was being "closed," and that we would have to file a new claim with the CPRC. Mr. Dale told me that the previous submission was adequate and not to refile. We were never notified that we could opt out of the finalized class action.

* * *

Mr. Herring then informed us that only six (6) units now qualified for replumbs, and many expenses would not be repaid. This was much worse than what was indicated by Mr. Dale on behalf of PCG and CPRC, and I asked to see the adjustments and the rest of our file. When I asked to

see what was in the Paces Watch file, Mr. Herring refused to let me see any of the file.

* * *

Thereafter, I received several notices concerning polybutylene in the mail, copies of all of which are attached, but none of the notices notified me of any right to opt out of the class action. In fact, I now know that these notices were mailed long after the October 20, 1995 opt out date anyway. I have never seen any notices or advertisements in the State of South Carolina concerning polybutylene pipe in any media. I have never seen any notices or advertisements concerning polybutylene on television, except the PCG notice I saw in New Hampshire. I have never heard on the radio nor seen in print in the media any notices or advertisements concerning polybutylene. We were not informed of the ability to opt out of the class action until my attorney told me about it in 1997.

The first the [sic] notification I received concerning the existence of the class action was the CPRC letter of February 6, 1996, which I have now learned was mailed months after the opt out deadline passed on October 20, 1995. Had I received notice that Paces Watch could have opted out of the class action, I certainly would have discussed the notice with our attorney. Given the convoluted and insufficient nature of the terms of the CPRC process, had we been given the choice, all of the Apartment Communities owned by the company I work for would have been opted out of the class action.

After the CPRC "took over" the handling of our claim, the adjustment process became very adversarial and difficult. It appears to me that the goal of the CPRC through Crawford and Company is to make the process as

difficult, complicated, and lengthy as possible in order to wear us down and therefore save money on our claim. It is often easier and faster to repair the leaks ourselves than to mess with the CPRC. Mr. Herring no longer returns my telephone calls, and has threatened to "close our claim" because we will not sign a release of our rights in the South Carolina action. The only workable solution for our problem with defective polybutylene pipe and fitting is to get the funds to replace the defective plumbing and handle it ourselves. We have found the CPRC process to be a nightmare and unacceptable.

The CPRC process is also inadequate in many respects. First there is the problem of having our leaks found to be "qualified leaks." A number of our serious problems are not covered by the manipulation of this term. Also, the benefits to be paid are less than the damage we suffer. For instance, we do not get paid for lost rental income, or for costs associated with putting our renters up during the repair process. Our apartments rent for $570.00-830.00 per month, and we have lost and will lose rental income during repairs. In wallpapered units, we are having to strip the wallpaper and paint the entire units because we cannot match the wallpaper. If the entire apartment complex were to be sold, the presence of polybutylene plumbing would [sic] detrimental in the eyes of a buyer, and the market value of the entire complex is diminished.

Repairing the leaks piecemeal is much more difficult and time consuming than replumbing the entire apartment buildings one at a time. Of course, replumbing would involve loss of income and actual cost of finding other accommodations for renters for at least one month, but we should be entitled to a fair and expedited recovery. These leaks continue to occur, and eventually either time will

run out on us, or all of the pipe will have to be replaced. We are stuck in the CPRC process because we were not notified of the class action, the terms of the settlement, or the ability to opt out of it, even though we were on the PCG mailing list. We feel that this situation could not [sic] acceptable under our system of justice, and request that the Court allow us to get out of the CPRC mandates and provide fair and adequate compensation for the losses we have suffered without oppressive supervision by the companies that made the defective pipe and fittings in the first place.

FURTHER DEPONENT SAYETH NOT.

/s/

Michael S. Brusseau

SWORN to before me this
14th day of November, 1997.

NOTARY PUBLIC FOR SOUTH CAROLINA

/s/

My Commission Expires: 3/18/2007

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) HOSPITALITY MANAGEMENT) ASSOCIATES, INC., et al.,)) Plaintiffs,)) vs.)) SHELL OIL COMPANY, et al.,)) Defendant.)) (formerly HOWARD v. SHELL))	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **AFFIDAVIT OF VICTOR APAT**

Before me appeared the undersigned, who first being duly sworn, stated as follows:

My name is VICTOR APAT, and I am a Plaintiff in the above action, both individually and as a partner in R & A Partners . . . I have lived in the Charleston area since 1983. I received a Bachelor of Science Degree in Building Construction, and a Masters Degree in Civil Engineering from Virginia Tech University in 1982 and 1983, respectively.

* * *

During my career, I have built and supervised the construction of hundreds, and perhaps over one thousand structures in the Charleston area. My building experience includes residential houses, cottages, storage sheds, office buildings, R&D buildings, school buildings, complex commercial roof systems, sewer systems, nursing and medical facilities, and the MUSC Wellness Center. In my experience as a commercial and residential contractor, I am familiar with plumbing systems generally and polybutylene plumbing systems specifically. A great number of the structures built by my company and by the other

companies I have worked for contain polybutylene plumbing systems. I currently own two (2) residences in Charleston which are plumbed with polybutylene. My present home at 2272 Portside Way, and my previous home at 39 Ripplemore Drive, which I still own and lease, both contain polybutylene plumbing systems.

As a result of my experience and position, I am keenly aware of issues which affect the building industry. I am on the mailing lists of building and contracting trade and licensing groups, including the State of South Carolina Board of Labor, Licensing and Regulation. I regularly subscribe to and read trade publications such as "Qualified Remodeler," "Dixie Contractor," "Construction Monthly," and "Building Products Magazine." I regularly consult with plumbing subcontractors about materials and fittings. I have utilized polybutylene plumbing systems extensively in construction, and do in fact own two homes plumbed with polybutylene. I own two (2) office buildings and warehouses with polybutylene systems. R & A Partners owns eight (8) office buildings containing polybutylene systems.

Despite all of the foregoing, I did not receive notice of the proposed class settlements in the Tennessee or Alabama class actions or my right to opt out of the settlements until after the opt out period expired. Despite being a builder and having purchased and installed thousands of feet of polybutylene pipe, a friend of mine is the one who informed me about one of the class actions by faxing me a newspaper article after October 20, 1995, the opt out date. After receiving the article, I immediately attempted to file an opt out in one of the actions, but, my first notice of the action came after the opt out deadline had passed.

Through my professional experience, I am very familiar with the practices common in the building industry, including the sale and installation of plumbing system components, and the tracking of such sales. There are a relative few plumbing supply distributors in any given area. Most plumbing contractors in the area, and certainly all large plumbing contractors, have a general trade account at a distributor. When plumbing supplies are bought on the account, the distributor usually notes the address of the structure for the delivery of plumbing system components to specific building locations. Even when plumbing supplies are delivered to a contractor's warehouse, and not to a specific jobsite, the project location is usually indicated. The designation of the jobsite on the invoice aids the contractor in assigning the costs of materials to the correct project for financial and pricing purposes. This is a selling point for the plumbing supply distributor, and, to the best of my knowledge, all of the distributors my company deal [sic] with have this practice.

Even if the distributor did not have the building locations on their computer records, the plumbing contractors themselves generally have reasonable records concerning, and could identify with minimal effort, most, if not all, of the buildings they have plumbed with polybutylene plumbing systems. It has been my experience that plumbing contractors generally use one kind of system for all buildings they plumb, unless the general contractor or owner specifies otherwise, which is the exception, not the norm.

Apart from the records maintained by the plumbing suppliers and contractors, to the best of my knowledge, all of the municipal governments with which I am familiar require a building permit application which specifies the

type of piping that will be used in the building. These records are available and could also be used to ascertain the location of structures with polybutylene. Furthermore, there are several trade groups in this state for contractors and plumbers which could facilitate the gathering of information with regards [sic] the location of polybutylene plumbing systems. Mailing lists can be obtained from the local and national Homebuilders Associations, or the Association of General Contractors ("AGC"), which reach almost all contractors in the state.

I believe plumbers would also be very helpful in researching their files to locate polybutylene plumbing system installations for a number of reasons. Cooperating with the replacement of these plumbing systems with more dependable piping would aid plumbers by decreasing "callbacks" on warranty items and by decreasing customer dissatisfaction with past work. Additionally, plumbers would in fact have more plumbing work available in the market due to replumbing and repairing these various facilities.

I have reviewed the so called "notice" program used by the Defendants in the class action, which was conducted through the media. It is my opinion that most laypeople, even if they saw and understood such a notice, and even if they made an investigation of their exposed pipe, would mistakenly believe they *did not* have polybutylene when they in fact did. This is true because the industry practice is to "stub out" polybutylene plumbing from the wall under sinks and around hot water heaters with short lengths of copper pipe. Most lay homeowners, upon inspection, would believe that their home was plumbed with the copper pipe entirely when, in fact, all of the plumbing except the stub outs was polybutylene. Additionally, in structures built on

concrete slab foundations, the pipe would be concealed in the slab and walls, and the type of plumbing could not be determined without cutting into the walls or breaking into the slab.

It is my opinion, based upon my experience and knowledge of the building industry, that a reasonably accurate and substantially complete list of polybutylene plumbing locations in the State of South Carolina could be compiled at a reasonable expense in a reasonable time period. The resources are available to identify almost all of the facilities and locations with polybutylene in order to give actual notice to those affected. To my knowledge, none of these resources were used.

Having made inquiry with a number of sources, it is plain to me that those responsible for notice in the polybutylene class actions did not make use of the best, most efficient, and most practical method of actually notifying the owners of buildings with defective plumbing systems. Any minimal effort would have directly reached a person in my position in plenty of time to make an informed decision about whether to opt out of the settlement. Instead, someone faxed me the notice after the opt out date. It is my opinion that the type of notice used, *i.e.* general media notice, is not an effective method of reaching individuals with polybutylene systems. In South Carolina, actual individual notification by mail to almost all such individuals would have been reasonably possible to effect and would have been the best and most practical method of notification.

I have reviewed a summary of the class action settlement process for obtaining repairs and replumbing. The most obvious problem with the process is the fact that the

structure owners are not in control of the repair/replumb process. Instead, the process is being handled by an insurance industry adjusting company charged with saving money, which has no duty to the owner. Even if work is authorized, there is no warranty provided, and the choice of contractor is made by the adjusting firm. This process creates a situation ripe for frustration and delay. The process leaves the owner at the mercy of contractors they have no control over, many of whom are individuals from another state working out of the back of their trucks, with no appreciable assets or insurance coverage. In my opinion, this process, mandated on most owners without notice, appears to serve the Defendants well while shifting the [sic] much of the burden associated with the defective pipe to the uninformed owners.

FURTHER THE AFFIANT SAYETH NOT.

/s/
VICTOR APAT

SWORN to before me this
17th day of November, 1997.

/s/

Notary Public for South Carolina
My Commission Expires: (date)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al. Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **Affidavit of Fleet Freeman**

The undersigned, Fleet Freeman, being first duly cautioned and sworn, states as follows:

1. That he is one of the attorneys for the plaintiffs in the above case and that in addition to the named plaintiffs, he represents 24 additional clients who are members of the putative class of owners of structures containing defective polybutylene plumbing systems. In all, my firm represents over 5,200 units, comprised mostly of multi-family dwelling units.

2. In attempting to evaluate the efficacy and propriety of the notices sent out in the *Cox* and *Spencer* class actions, which the defendants assert was adequate and the best practicable notice, I learned that there was a publication in existence in 1994 and 1995, which was then and still is readily available to any interested member of the public, a compilation of all multi-family housing for each county in the State of South Carolina. A copy of one of these representative publications entitled "MULTI-FAMILY HOUSING SURVEY" is attached hereto as Exhibit A to this affidavit.

3. A review of the attached Exhibit A reflects that there was readily available to the defendants in the *Cox* and *Spencer* class actions, a single document for each South Carolina county which reflects the number of multi-family complexes in each county, the number of units in each complex, the names and addresses of each complex, the names, telephone numbers and addresses of each resident manager and each contact person, the number of bathrooms in each unit, the number of bedrooms in each unit, the date of construction of each complex, and other pertinent data.

4. To have sent an effective notice reaching most of the plaintiffs and other members of the putative class, all the *Cox* and *Spencer* defendants needed to do was to purchase these comprehensive surveys for each county and mail notices to the persons at the addresses provided therein. Based on my calculations, such notice would have reached over 95% of my clients. It would not have been necessary to send notices to those persons whose buildings were built outside the inclusive dates of January 1, 1978 through July 31, 1995. That information was easily discernable from the survey.

The foregoing statements are true and correct to the best of my knowledge and belief.

Dated this 3rd day of December, 1997.

S/ Fleet Freeman
Fleet Freeman

Sworn and subscribed before me this 3rd day of December, 1997. /s/

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON HOSPITALITY MANAGEMENT ASSOCIATES, INC., et al. Plaintiffs, v. SHELL OIL COMPANY, et al., Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NUMBER: 95-CP-10-1948 **Affidavit of Jeffrey A. Raines**

The undersigned, Jeffrey A. Raines, being first duly cautioned and sworn, states as follows:

1. I am the President and CEO of Insurance Claims Consultants, Incorporated (ICC), a South Carolina corporation that is in the business of adjusting insurance and related claims for customers in and outside the State of South Carolina.

2. Our company was retained to represent owners of structures containing polybutylene plumbing. After being retained we promptly notified the PCG of our involvement, and ICC then proceeded to adjust the owners' claims. Attached as Exhibit A is a copy of a typical letter sent to the PCG in behalf of our customers. The PCG hired Crawford Company, insurance industry adjusters, to adjust these claims in behalf of the manufacturers.

3. By mid-1995, ICC had been retained by customers in South Carolina, Georgia, Tennessee, Florida, North Carolina and Virginia. In each instance, we notified PCG of each owner's claim and our involvement in the process.

* * *

5. Despite the fact that ICC had notified the PCG of each of our customers' claims covering approximately 5000 units, and despite the fact that the PCG had acknowledged our correspondence concerning many if not all of these claimants, no notice was sent to ICC or any of our customers that there was a class action in Alabama or a class action in Tennessee which affected their rights of recovery, or that there was a time limit in which to opt-out of these class actions.

* * *

7. Notwithstanding the fact that the PCG had a data base with our customers' names and addresses of the affected properties, the only notice given to our customers was received by them in early 1996 long after the opt-out date. A copy of one of the typical letters of notification received by our customers advising them that their PCG file was being closed and further processing must be done under the CPRC established by Cox is attached hereto as Exhibit B. It seems to me that if the defendant manufacturers, Dupont, Shell and Hoechst Celanese, could give written notice to our customers that their PCG files were being closed, that they could have notified them of the existence of a class action which purported to take away their rights to a fair adjustment or adjudication of their claims.

* * *

S/ Jeffrey A. Raines
Jeffrey A. Raines

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,	§	CIVIL ACTION NO. 18,844
PLAINTIFFS,	§	CLASS ACTION
vs.	§	OBION COUNTY
SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY and HOECHST CELANESE CORPORATION,	§	
DEFENDANTS.	§	

AFFIDAVIT OF MARY LOU STRANGE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Mary Lou Strange, known to me, who, being first duly sworn, deposed and stated on her oath as follows:

1. My name is Mary Lou Strange. I am a partner in the law firm of VINSON & ELKINS, L.L.P. I have been

licensed to practice law in the State of Oklahoma since 1983 and in the State of Texas since 1988. Since 1988 I have represented Shell Oil Company in polybutylene plumbing litigation. . . .

Class Counsel Have Settled Their Cases For Amounts Consistent With the Relief Provided in the Settlement.

2. Fleming argues that class counsel have settled other cases in which they represent individual plaintiffs on a more favorable basis than the terms of the *Cox* settlement. . . .

A. *Jim Moriarty and Steve Hackerman*

Jim Moriarty and Steve Hackerman, who have had extensive experience in polybutylene litigation, settled the claims on some 12,000 homes for $88 million – approximately $7,300 per house. This figure included 40% for attorneys' fees and 2% for the costs of litigation. Thus, the net average settlement amount per house was $4,234, approximately the cost of a replumb and some past damages.

B. *Michael Caddell*

In arriving at the $8,300 per house average settlement figure for the *Carrera* case, Fleming again fails to note that this figure includes both attorneys' fees and costs of litigation. Since neither of these items are included in the *Cox* Settlement, they should also be excluded from the *Carrera* settlement to provide the basis for an accurate comparison. Attorneys' fees and litigation costs in *Carrera* settlement to provide the basis for an accurate

comparison. Attorney's fees and litigation costs in *Carrera* totaled approximately 40% of the settlement amount. Thus, the proper figure for comparison to the *Cox* settlement is $4,980. Again, this figure represents the approximate cost to an individual of a replumb with an additional allowance for some past damages.

The Results of Trials In Polybutylene Cases Are Also Consistent With The Relief Provided in the *Cox* Settlement.

3. Fleming has listed the results of both trials and settlements in support of his argument that the *Cox* settlement is inadequate. Since factors other than the likely litigation result may influence the amount a client is willing to pay to settle a particular case, the differences between verdicts and settlements can be significant. Additionally, the settlements in three cases which were resolved without trial – ***Breaz***, ***Lazarine***, and ***Martin***, were the result of payments by multiple defendants, who settled individually. Thus, the sum of the settlements greatly exceeds the total of actual damages homeowners would have been entitled to recover at trial. The homeowners are entitled only to a single recovery, and that is exactly what is provided in the *Cox* settlement.

4. Moreover, even the jury verdicts must be evaluated in light of factors which may cause them to differ from the relief offered under the *Cox* settlement. The verdicts Fleming cites include elements of damage which should not be considered as a basis for comparison with the *Cox* settlement. For example, in the cases cited, claims based on the Texas Deceptive Trade Practices Act were submitted. The Texas Deceptive Trade Practices Act permits the recovery of attorneys' fees, automatic trebling

of the first $1,000 of actual damages, and the recovery of additional damages not more than three times the amount of actual damages in excess of $1,000. Tex. Bus. & Comm. Code § 17.50. Many of the verdicts also include awards for mental anguish. Most of the states in which the properties belonging to the *Cox* settlement members are located would not permit these types of damages. In order to compare the verdict results to the *Cox* settlement, these damages should be excluded. Thus, simply providing the court with a gross, and often inaccurate, number without explaining that substantial portions of the number may not be recoverable by members of the *Cox* settlement class is seriously misleading. (Citation omitted)

5. When the awards for attorneys' fees, which are excluded from the *Cox* settlement, and the awards for mental anguish and punitive damages, which are of doubtful validity in most states, are excluded, the remaining elements of damage awarded by the juries are comparable to the relief provided in the *Cox* settlement.

A. *Diehl*

Fleming has apparently computed the average recovery listed for the *Diehl* cased [sic] based solely on plaintiffs who actually recovered, ignoring plaintiffs who received no recovery from defendants. The average recovery for all plaintiffs was $55,000. This figure includes a $9,000 average recovery for attorneys' fees. In most states no award for attorneys' fees would be permissible for this type of action. However, not only would litigants not be entitled to recover attorney fees, they would be liable to pay their attorney based on a contingency fee contract – in Fleming's cases that is typically 40%. Thus, including the attorneys' fees in the average grossly overstates

the amount most settlement class members would be entitled to recover in litigation. Moreover, since the *Cox* settlement does not include attorneys' fees payments, attorneys' fees should not be included in any comparison.

In addition to attorneys' fees, the average recovery in *Diehl* includes $2,000 in automatic damages and $12,500 in additional damages under the Texas Deceptive Trade Practices Act, as well as $2,000 in damages for mental anguish. These damages would not be available to the vast majority of settlement class members.

In order to accurately compare the *Diehl* verdict to the *Cox* settlement, those damages should be excluded. The computation is then as follows:

$33,000	average award
-9,000	attorneys' fees
-2,000	automatic trebling
-12,500	additional damage
-2,000	mental anguish
$ 7,500	
-3,000	less 40% attorneys' fees
$ 4,500	net recovery to plaintiff

This figure is comparable to the cost of replumbing a house – precisely the relief provided in the *Cox* settlement.

B. *Kochie*

Again, Fleming has ignored the fact that some plaintiffs did not recover against any defendants in computing his average recovery. The average recovery in the *Kochie* trial was $14,700. Of this amount, $7,250 per house is included for attorneys' fees, $1,000 in automatic trebling,

and $2,500 in additional damages. When these amounts are subtracted from the average, the result is the following:

$14,700	average recovery
-7,250	attorneys' fees
-1,000	automatic trebling
-2,500	additional damage
$ 3,950	
-1,580	less 40% attorneys' fees
$ 2,370	net recovery to plaintiff

This amount is substantially less than the cost to replumb offered in the *Cox* settlement.

C. *Schmidt*

It is not clear whether Fleming has based his average damage figure on the jury's verdict or on the settlement agreement which was reached after verdict. Fleming's figure is not consistent with either one. At any rate, the average for all past damages and the cost to replace the plumbing system found by the jury was $9,400. If 40% in attorneys' fees is subtracted from this, the net recovery is $5,640. Again, this is approximately the cost an individual would pay for a replumb with some amount remaining to compensate for past damages.

D. *Babb*

The jury in **Babb** did not award punitive damages, attorneys' fees, mental anguish, or damages for permanent diminution in property value. The jury awarded only damages for past damages and the cost to replumb. The average jury award for these damages was $6,461. Apparently, Fleming based his $16,000 figure on settlements,

not on the jury's determination of damages. When attorneys' fees are subtracted from the $6,461, a net recovery of $3,877 remains. This is, once again, approximately the cost an individual would pay for a replumb. The *Cox* settlement is, therefore, consistent with this result.

E. *Patterson*

The jury found Shell was not liable to any plaintiffs in this action. However, the jury did award actual and punitive damages against other defendants. The bulk of Fleming's $32,066 average is punitive damages and mental anguish. The actual damages, excluding mental anguish, which were awarded by the jury averaged $7,780 per house. When attorneys' fees are subtracted from this number, the net recovery is $4,668. This figure would cover an individual's cost of replumbing with some allowance for past damages.

6. As the above information proves, when awards for damages such as attorneys' fees and punitive damages are excluded, plaintiffs have recovered precisely the relief provided for in the *Cox* settlement.

/s/ Mary Lou Strange
Mary Lou Strange

OPT OUTS

1. Valid (Orange Card) Opt Outs – $26,000

   Get notice they've validly opted out but can opt in and if so have extended time to file for past damages.

2. White Card Opt Outs – 200,000

   Get Notice their opt out has been invalidated by court but get a new chance to opt out – plus extended time to file past damages if they don't opt out.

3. Shell Opt Outs – 25 plus or minus

   Do nothing

4. Late filed Opt Outs – 90,000

   Orange Cards) White Cards) Multiples) Advise both that their opt out has been invalidated for not being timely; give them new notice describing enhanced benefits and an extended time to file claims for past damages.

5. Multiple Opt Outs – Tad Has

   Have divided them into category (1) and (2) and they should be treated accordingly

6. Miscellaneous – Illegible Opt Outs, etc.

   Invalidate by Judge

Order to Court setting both the above (except Item 3 which should be ignored) with list of names/addresses and approving the above treatment.

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated.	§Civil Action No. 18,844 § § §CLASS ACTION § § §OBION COUNTY §
Plaintiffs,	§
v.	§
SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY and HOECHST CELANESE CORPORATION,	§ § § §
Defendants.	§

DENIED INTERVENOR'S FOURTH MEMORANDUM REPORTING THE NUMBER OF OPT-OUTS

Now comes denied Intervenor, Tony Martin, by his undersigned attorneys herein, to advise the court of the status of the opt outs in the Cox case. The last report by Plaintiffs' Class Counsel to the Court was that only 2,000 opt-outs to the Cox settlement had been received. Plaintiffs' Class Counsel and the Defendant's cited this number of opt-outs as indicative of acceptance of the settlement offer by the class.

Recently, neither Plaintiffs' Class Counsel nor the Defendants have reported the status of the opt-outs to the Court. This is to advise the court that requests for

exclusion from the Cox class have now been filed on behalf of the owners of over 400,000 housing units. This constitutes the largest number of individuals to opt out of a class in the history of U.S. class action litigation. The number of opt outs now constitutes a multiple of three or four of the number of people who have requested relief in the class settlement.

Intervenor herein, who has been denied the right to even intervene in this suit by the Court, infers that the number of opt outs received to date is some indication of the disapproval of the actions of Plaintiffs' Class Counsel in the Cox settlement and also a disapproval of the manner in which this Court has proceeded.

Respectfully submitted,

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By: _____
George M. Fleming

ATTORNEYS FOR INTERVENOR

SHELL ESTIMATE OF REPLUMB LIABILITY

(1) MOBILE HOMES – Shell estimates 3 million mobile homes at a Shell estimate of $800 per mobile home	$2.4 Billion
(2) SINGLE-FAMILY HOMES – Shell estimates 1 million single-family homes at a Shell estimate of $4,000 per home	$4 Billion
(3) MULTI-FAMILY UNITS – Shell estimates 700,000 multi-unit structures (apartments, duplexes, etc.), but will not give an average cost of repair of these units. For purposes of illustration, we assume a ridiculously low estimate of $1,000 cost of replumb per unit	$700 Million
TOTAL	$7.1 Billion

SHELL CELANESE PLAINTIFFS
Principles of Agreement
Cox/Spencer Actions

This Statement of Principles of Agreement ("Principles") represents the culmination of a mandatory settlement process conducted in certain litigation pending in Obion County, Tennessee known as *Cox v. Shell, et al.* ("Cox") and pending in Greene County, Alabama known as *Spencer v. Shell, et al.* ("Spencer") between Plaintiffs' counsel and certain of the Defendants therein, Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"). These Principles, and the parties' rights and obligations thereunder, are expressly conditioned on the parties reaching agreement on final settlement documents reflecting these Principles.

1. Settlement Amount, as defined in the *Cox* Class Settlement, increased to $950 million.

* * *

7. The Alabama court retains jurisdiction over an award of attorneys' fees and expenses to *Spencer* class counsel for their work with respect to the combined *Cox/Spencer* settlement. Upon entry of the *Cox* Judgment and subject to ¶ 18, the parties agree that the application and award of fees and expenses to *Spencer* class counsel from Shell and Celanese for their work on the combined settlement shall not exceed $30 million. The parties further agree not to object to such an award.

* * *

10. All parties (including members of *Cox* and *Spencer* class counsel serving on the Official Polybutylene Claimants Committee) agree to cooperate in the development of a consensual plan in the U.S. Brass

("Brass") Bankruptcy proceeding with the elements and subject to the conditions contained in the separate agreement (the "Brass Agreement") to be entered into between Brass, Eljer Manufacturing, Inc. and Eljer Industries, Inc. ("The Eljers"), Shell, Celanese, and the *Cox/Spencer* Plaintiffs, including the following:

a. The Eljers obtain releases and injunctive relief in the *Brass Bankruptcy*;

b. The Eljers receive assurances satisfactory to The Eljers from Celanese and/or Shell relating to liability for claims arising from PB sales to date;

c. Eljer Manufacturing retains ownership of Brass;

d. When and if Brass and The Eljers receive payments for Plumbing Claims under their insurance policies, Brass and The Eljers agree to pay the *Cox* Class an amount equal to the net proceeds recovered, provided that 50% of the first $10.0 million shall be retained by The Eljers to purchase replacement insurance coverage. Brass and The Eljers agree that they will work with the *Cox* Class to determine the most effective way to pursue these claims. The parties agree to take all reasonable steps to cooperate with each other and to fulfill Brass and The Eljer's duties to cooperate with their insurance companies;

e. 17.5% of the equity in Eljer Industries, Inc. is conveyed to the *Cox* Class;

f. Upon confirmation of a plan of reorganization acceptable to The Eljers, $2.5 million will be payable by Eljer Industries, Inc. to Defendants as reimbursement or attorneys' fees to be paid to Plaintiffs' Class counsel in *Cox* and *Spencer* and 3.5 million will be payable by Eljer Industries,

Inc. to the *Cox* Class and thereafter Eljer Industries shall pay the *Cox* Class $2 million annually for ten years (without interest, with the first annual payment payable on December 31, 1996); and

k. Assignment to the *Cox* Class of 75% of net proceeds of Household litigation (subject to the approval of The Eljers' banks) and Eljer Industries will continue to fund litigation fees and expenses (joint approval required of settlement and changes in attorneys' fees arrangements).

* * *

13. The parties agree that they will withdraw or cause to be withdrawn all objections (and related appeals) filed by them or caused by them to be filed in *Cox*, including as to the settlement and the awards of attorney's fees and expenses referred to above.

* * *

17. *Cox* and *Spencer* class counsel shall use best efforts to secure dismissal of all state court polybutylene class actions in which *Cox* and *Spencer* class counsel are counsel of record.

18. In the event that DuPont does not agree to execute the attached agreement, Exhibit A or other agreement mutually acceptable to all parties that coordinates the *Spencer* settlement with the *Cox* settlement prior to the *Spencer* fairness hearing on November 17, 1995, then *Spencer* class counsel will present the modifications set forth in the attached agreement. Exhibit B or other mutually acceptable agreement and advise the court that it should not approve the settlement without the modifications. If the modifications are not approved, then the parties agree to cooperate in the pursuit of claims against

DuPont, including claims assigned to HCC and Shell under the *Cox* agreement, on terms to be negotiated promptly.

DATED: November 7, 1995

APPROVED:

/s/ Don Barrett *Cox* Class Counsel	/s/ Peter [Illegible] Hoechst-Celanese Corporation
/s/ [Illegible] *Spencer* Class Counsel	/s/ Hugh H. Sam Shell Oil Company

AGREEMENT BETWEEN HOECHST CELANESE CORPORATION, SHELL OIL COMPANY AND FLEMING, HOVENKAMP & GRAYSON

(Filed March 8, 1996)

Following a Settlement Conference held in Monterey, California, before Judge Richard M. Silver and a mediation held in Houston, Texas, before M. A. ("Mickey") Mills, this Agreement (the "Agreement") is made and entered into this the 20th day of December, 1995, by and among Hoechst Celanese Corporation ("Celanese") and Shell Oil Company ("Shell") (collectively referred to as the "Defendants") and Fleming, Hovenkamp, & Grayson, P.C. ("FH&G") on behalf of FH&G's individual plaintiffs that have polybutylene plumbing claims in lawsuits pending in Harris and surrounding counties through the State of Texas and elsewhere as described in more detail in Exhibit "A" and hereinafter referred to as the "Lawsuits."

* * *

1. *Purpose*. The purpose of this Agreement is to resolve all polybutylene plumbing-related claims of each and every one of the approximately 110,000 Claimants represented by FH&G against Shell and Celanese as defined herein.

2. *Cash Payment*. Subject to the terms hereof, on or before January 19, 1996 ("the funding date"), Shell and Celanese shall pay FH&G the collective sum of ONE HUNDRED SEVENTY MILLION AND NO/100 DOLLARS ($170,000,000) (the "Funds"), to be held in an escrow account (the "Primary Escrow Account") at First Interstate Bank of Texas, N.A. ("FIB"), or other mutually agreeable bank, with FIB or other mutually agreeable bank serving as escrow agent ("Escrow Agent") for future

distributions to attorneys and Eligible Claimants. All escrow accounts created under this Agreement shall be subject to the escrow and/or trust agreement consistent with the terms of this Agreement and acceptable to all Parties, and Shell and Celanese shall not be obligated to fund any part of this Agreement until these escrow agreements are reached. All parties will use their best efforts to complete the escrow agreement prior to or by January 19, 1996. Subject to the terms hereof, this cash payment is to be distributed among Eligible Claimants representing approximately sixty thousand (60,000) Property Units as defined herein according to a formula developed by FH&G, approved by the Special Master, as defined herein, and approved and accepted by Eligible Claimants.

The Funds consist of two components: (1) $20 million in full payment of any and all expenses represented by FH&G to have been incurred by FH&G in prosecuting the polybutylene litigation; and (2) $150 million representing cash payments to the Eligible Claimants and attorneys' fees.

* * *

5. *Replumbs*. Within two years from the date this Agreement is executed, Shell and Celanese shall replumb as many of, but not more than, sixty thousand (60,000) Property Units that qualify for replumbs under paragraph 6 below; however, in no event shall any replumb obligation of Defendants apply to recreational vehicles. The scope of the replumb is defined in Exhibit "F" attached hereto and incorporated herein by reference. For the purposes of this Agreement, the term replumb includes the scope of replumb as defined in Exhibit "F" as well as replacement of stops and supplies and/or yard lines if a PB Plumbing

System is not present in the Eligible Claimants' Property Unit. For those Eligible Claimants that have already received replumbs due to a leak from an entity other than Defendants, the CPRC or the PCG, Defendants agree to reimburse the Eligible Claimant for the amount of the reasonable documented replumb cost borne by such Eligible Claimant. If the Defendants reimburse an Eligible Claimant for their replumb costs, the number of units included in this reimbursement will be counted toward the sixty thousand (60,000) property units subject to replumb, but will not be counted as a reduction in the $170 million payment.

6. *Conditions for Settlement and Payment.* For an individual Claimant to be an Eligible Claimant ("Eligible Claimant") qualifying for settlement, replumb and/or payment under this Agreement, the following conditions must be met:

a. Claimant and Claimant's Property Unit must be individually represented by FH&G.

* * *

c. FH&G represents to the Defendants that an Eligible Claimant shall have participated in the litigation process in some manner including, but not limited to, providing claim/damage information for answering written interrogatories, having their Property Units inspected, or having their deposition taken.

* * *

e. An otherwise Eligible Claimant whose property has not already had a leak before the execution date of this Agreement will be entitled to a replumb within three (3) months of their first leak if such leak occurs on or

before July 1, 2000 or within the applicable time periods as defined in the *Cox* agreement attached hereto as Exhibit "C," whichever is later. With regard to multi-unit properties, a leak in one unit entitles the entire building to a replumb; however, a leak in a yard service line does not trigger a replumb of the building's interior plumbing and vice versa.

f. For those Claimants that do not qualify for replumb or payments under this Agreement because they have not met the criteria set forth to qualify as an Eligible Claimant and the Special Master appointed by Judge Russell Lloyd ("Special Master") pursuant to Paragraph 20 has approved that they are therefore not Eligible Claimants as defined under this Agreement ("Ineligible Claimants"), such clients are already included in the definition of the class in the *Cox* class action filed in Union City, Tennessee. FH&G will communicate in writing to each Ineligible Claimant that their claims are subject to dismissal, that their opt-out has been invalidated and will recommend in writing that these Claimants remain as class members in the *Cox* class action and receive the benefits and relief set out in the *Cox/Spencer* settlement. To effectuate this provision, FH&G will immediately make a motion to the *Cox* court for an order approving this communication to Ineligible Claimants and the process set forth below. Approval of this process by the *Cox* court must be obtained before either Shell or Celanese is obligated to fund pursuant to paragraph 2.

Those Claimants receiving relief under the *Cox* class action shall not be included in the sixty thousand (60,000) replumbs described above; nor shall they be

entitled to any distribution of the ONE HUNDRED SEVENTY MILLION AND NO/100 DOLLARS ($170,000,000.00) FUNDS.

Process: With regard to Ineligible Claimants who are entitled to relief in the *Cox* class. FH&G will identify such Ineligible Claimants and mail to each of these a letter approved by the Defendants and the *Cox* court giving them thirty (30) days in which to opt out of the *Cox* Class Action on the following schedule from the date of this Agreement, as follows:

(1) within sixty (60) days of the date of agreement, FH&G will identify to the Special Master and Defendants and make the aforesaid mailing to such Ineligible Claimants with 25,000 Property Units; and

(2) within one hundred fifty (150) days of the date of the agreement, FH&G will identify to the Special Master and Defendants and make the aforesaid mailing to such Ineligible Claimants with an additional 25,000 Property Units.

g. If, out of the 50,000 Ineligible Claimant Property Units, as set out in paragraph f above, more than 7,500 property units elect to opt out of the *Cox* class action, FH&G will refund to Shell and Celanese $750,000 of attorney's fees for every 1,000 Ineligible Claimant Property Units that elect to opt out over and above 7,500 opt outs.

To ensure sufficient funds to cover the refund called for above in the event there are more than 7,500 opt-out units, the Escrow Agent shall transfer to a separate Opt-Out Escrow Account at FIB the sum of $3.5 million from each of the first two distributions of Attorneys' Fees

made under paragraph 4.b. hereof. Within 10 days of FH&G's compliance with f(1) and (2), the number of Ineligible Claimants Property Units opting out of the *Cox* Class Action shall be reported by FH&G To the Special Master. The Special Master shall prepare a written recommendation to the *Cox* court concerning the number of such opt outs for delivery to the *Cox* court within five (5) business days. The Parties shall have an opportunity to submit a response to this recommendation to the *Cox* court within ten (10) business days of the submission of the recommendation to the *Cox* court. If Defendants have no objection to the recommendation, they agree to use best efforts to obtain the *Cox* court's approval of this recommendation. As soon as the *Cox* court has ruled on this recommendation, to the extent the *Cox* court has ruled that the total number of opt outs is less than 7,500, the Special Master shall direct FIB, in writing, to disburse the funds in the Opt-Out Escrow Account, to FH&G within three (3) business days. Interest earned on this escrow account shall be paid to the party who receives the disbursement. In the event both FH&G and Defendants are entitled to a disbursement from the Opt-Out Escrow Account the interest shall be paid to each party on the amounts returned to each party.

To the extent the *Cox* court has ruled that there are more than 7,500 opt outs and thus the Defendants are entitled to a refund, the Special Master shall determine the amount to be refunded pursuant to the above paragraph and then shall direct FIB, in writing, to disburse the funds to Shell and Celanese from the Opt-Out Escrow Account. If the refund to Defendants is less than the total amount retained in the Opt Out Escrow Account, such excess funds shall immediately be distributed as Attorneys'

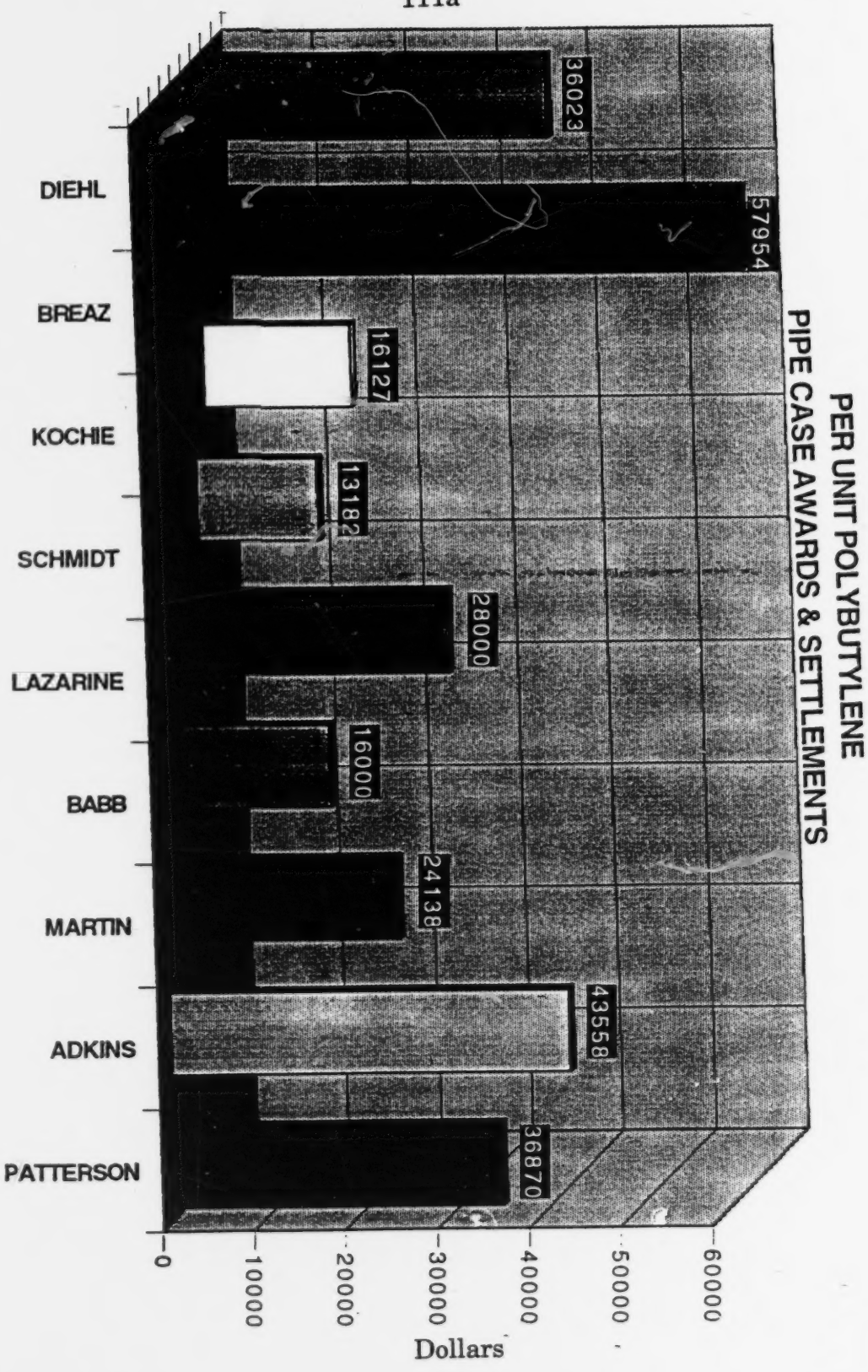
Fees as directed, in writing, by the Special Master. If the funds held in the Opt-Out Escrow Account are insufficient to cover such refund to the Defendants, then the entire fund shall be paid to the Defendants and the remaining refund amounts shall be paid to Defendants by deducting 50% of each subsequent Attorneys' Fee distribution and paying such monies to Defendants until the refund is paid in full.

* * *

/s/ Hugh H. Sam
Shell Oil Company
Date: 12/20/95

/s/ [Illegible]
Hoechst Celanese Corporation
Date: 12/20/95

/s/ George M. Fleming
Fleming, Hovenkamp & Grayson, P.C.
Date: 12/20/95


PER UNIT POLYBUTYLENE
PIPE CASE AWARDS & SETTLEMENTS
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KOCHIE
SCHMIDT
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No. 03-1431

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., *et al.*,
Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY,
HOECHST CELANESE CORPORATION, and
E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

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QUESTION PRESENTED

Whether the South Carolina Supreme Court erred in affording full faith and credit to final settlement judgments in two national class actions based on its determination that the due process issues related to the binding effect of the settlements were fully and fairly litigated in, and necessarily decided by, the state courts that approved them.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

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IN THE

Supreme Court of the United States

No. 03-1431

HOSPITALITY MANAGEMENT ASSOCIATES, INC., *et al.*,
Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY,
HOECHST CELANESE CORPORATION, and
E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

INTRODUCTION

Petitioners collaterally attack two national class action settlements approved as final judgments by Alabama and Tennessee state courts. Petitioners did not opt out of the settlements, nor have they pursued claims for recovery under the settlements. Instead, petitioners seek to prosecute a competing nationwide class action in South Carolina, asking the state court to second-guess the earlier determinations by sister state courts that the national class action settlements were proper and that all due process requirements were met.

The Supreme Court of South Carolina rejected that request. After carefully determining that all of the relevant due process issues had been fully and fairly litigated in and resolved

by the settlement courts, the South Carolina Supreme Court granted full faith and credit to the final judgments approving the settlements, and therefore it affirmed the dismissal of petitioners' competing action.

This petition is not an appropriate vehicle for the Court to address the issues raised in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003), *aff'g by an equally divided Court* 273 F.3d 249 (2d Cir. 2001). Among other reasons, the settlements challenged by petitioners are substantially different from that in *Stephenson*. Moreover, on the merits, the decision of the South Carolina Supreme Court is correct. It is consistent with the decisions of this Court and a long line of cases in both the state and federal courts declining to allow collateral attacks in situations such as the one presented here. For these reasons, the petition should be denied.

COUNTERSTATEMENT

A. Polybutylene Plumbing Litigation Background

Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E. I. du Pont de Nemours and Company ("DuPont") produced raw materials sold to other manufacturers who used those materials to make plumbing components. Shell sold polybutylene resin to manufacturers who extruded it into pipes for use in plumbing systems. Celanese and DuPont sold acetal plastic resin to manufacturers who molded it into fittings used to connect pipes in plumbing systems.

Since the early 1980s, litigation has been brought against various defendants, including respondents and other manufacturers, over polybutylene plumbing systems. Beginning in the mid 1990s, numerous plaintiffs' attorneys filed putative statewide or nationwide class actions, including the instant case, in various jurisdictions throughout the country. Pet. App. 29a.

B. The *Spencer* and *Cox* Settlement Judgments

1. In November 1994, *Spencer v. Shell Oil Co.*, No. CV-94-047 (Cir. Ct., Greene Cty., Ala.), a nationwide class action, was filed against respondents in Alabama state court. In May 1995, DuPont agreed to a national class action settlement in *Spencer*. After a hearing, the Alabama court preliminarily approved that settlement on May 25, 1995.

Under the terms of the *Spencer* settlement as finally approved, DuPont agreed to pay class members 10%[1] of (1) the cost of a replumb occurring within 15 years of installation of a polybutylene system, whether or not the class member suffered any leaks, and (2) the value of physical damage to tangible property caused by a leak occurring within 15 years of installation. Pet. App. 5a, 7a.[2] DuPont agreed to provide at least $120 million to fund these costs. The $120 million figure is a "soft cap"; if the costs of the settlement exceed $120 million, DuPont must choose whether to provide additional funding under the terms of the settlement or to decline to provide such funding. If DuPont declines to provide funding in excess of $120 million, then under the terms of the operative agreements and stipulations "class members who had not been paid would retain all rights against DuPont" (*id.* at 5a), and the settlement operates to toll applicable statutes of limitation from the date the lawsuit was filed until three months after DuPont provides notice declining to provide additional funding.

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[1] DuPont's litigation exposure to possible damages was small relative to that of Shell and Celanese; DuPont sold a smaller quantity of material for this use, in part because its involvement was for a shorter time period.

[2] The settlement actually was more favorable to class members than described by the court below; the 15-year restrictions were not applied to claims submitted within one year of the first class notice. Likewise, the 15-year restrictions were not applied for a period following the supplemental class notices (four and eight years, respectively, after the first notice).

The Alabama court in *Spencer* approved a comprehensive $7.4 million notice program that was designed and coordinated by a professional and highly-qualified firm with "extensive experience in designing and implementing successful, court-approved notice programs in a variety of significant class actions." *Id.* at 48a. The notice program had several components. First, the notice expert coordinated the direct mailing of over 2.5 million notices to individuals, including more than 245,000 notices to South Carolina residents. Second, the notice expert conducted a "massive national media campaign" (*id.* at 22a), including television advertisements on national network and cable broadcasts during soap operas, morning talk shows, evening newscasts, and sporting events. Thirty-second radio advertisements were carried on the ABC Radio Network and the American Urban Radio Network, which have affiliates in South Carolina. The notice program also included an extensive print campaign that targeted national publications, such as *USA Today*, *TV Guide*, *Parade*, and *Jet*, as well as local and regional newspapers throughout the country, including daily, weekly, and monthly newspapers in South Carolina with a combined circulation exceeding 800,000. *Id.* at 49a. Information kits were also mailed to numerous membership organizations with interests related to polybutylene plumbing.[3]

An affidavit submitted to the Alabama court by the consultant who coordinated the notice campaign reported that an independent national media firm estimated that the paid advertising program in its entirety reached 96.6 percent of adults nationwide and that they were exposed to the message an average of 4.9 times. Those numbers were likely even higher in South Carolina, which received more emphasis in the notice campaign. *Id.*

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[3] The notice campaign also included non-paid or "earned media," such as press releases and video news releases. Two supplemental notice programs were conducted in 1999 and 2004.

2. In June 1995, *Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct., Obion Cty.), another nationwide class action, was filed in Tennessee state court against Shell and Celanese (DuPont was not a party). On August 9, 1995, the *Cox* court preliminarily approved a nationwide class settlement. Under the settlement agreement, Shell and Celanese agreed to fund replumbs and physical damage to tangible property of the class members caused by a qualifying leak and to provide $850 million in a "soft cap" fund.[4]

3. *Spencer* class counsel filed objections to the *Cox* settlement in August 1995. Likewise, *Cox* class counsel filed objections to the *Spencer* settlement in October 1995. Shell and Celanese also filed oppositions to the *Spencer* settlement. In October and November 1995, *Cox* and *Spencer* class counsel and respondents participated in a mediation under the auspices of California Circuit Court Judge Robert Silver.[5] After the mediation, some changes were made to the *Cox* settlement, including an increase in the initial funding to $950 million. Judge Silver noted that "[b]efore I would agree to recommend the settlement, it would have to meet a class fairness standard. . . . I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees." Pet. App. 57a.

4. The Alabama court conducted a fairness hearing on the *Spencer* settlement and gave it final approval on November 17, 1995. The Alabama court found that the *Spencer*

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[4] Because of the soft cap, the value of the settlement to class members is much higher than the $150 asserted by petitioners. Pet. 6. Each class member receives the full cost of a replumb and any damages to tangible property as a result of a leak—amounts far in excess of $150 per unit. And, the soft cap means the fund amount ultimately could be much higher than the initially agreed-upon figure.

[5] Judge Silver was presiding over yet another putative statewide class action in California. The *Cox* and *Spencer* courts were aware of Judge Silver's mediation efforts. Pet. App. 31a.

settlement agreement was "fair, adequate, and reasonable to the Plaintiffs." App. 16a-17a.

With respect to the adequacy of notice to the class—which the court recognized was a due process prerequisite for the settlement to have binding effect on absent plaintiffs—the *Spencer* court specifically held that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein." *Id.* at 17a. It also held that the notice "fairly and accurately described the pending Action" and "advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont settlement." *Id.* Finally, the *Spencer* court fully considered and overruled objections about inadequate representation, specifically holding that "[u]nquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action" (*id.* at 8a), and that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

5. The Tennessee court likewise conducted a fairness hearing on the *Cox* settlement and gave it final approval on November 17, 1995, noting it included "a singularly comprehensive and creative notice program." Pet. App. 19a. The court characterized it as providing the best notice practicable under the circumstances, and specifically ruled that it "met and exceeded" minimum due process requirements. *Id.* at 21a-22a. With respect to adequacy of representation, the court held that "*Cox* class counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 59a.

C. The Proceedings Below

The instant case was filed in the Court of Common Pleas in Charleston, South Carolina on May 30, 1995, five days after the *Spencer* court had preliminarily approved DuPont's settlement. On August 17, 1995, the six original plaintiffs were joined by two potential intervenors. On February 2, 1996, the original plaintiffs (who had not yet moved for class certification), each of whom had opted out of the *Cox* and *Spencer* settlements, reached individual settlements with respondents and agreed to dismiss their claims with prejudice. The original intervenors also entered settlements.

On March 27, 1996, less than two hours before the clerk signed an order of dismissal, petitioners' counsel filed a motion to intervene in the case on behalf of new intervenors and a putative class. The trial court ultimately granted the motion to intervene on behalf of this competing putative class. Like the class representatives in *Cox* and *Spencer*, petitioners described themselves as "owners of structures containing polybutylene plumbing systems." Pet. 3. None of the petitioners opted out of, or made claims for recovery under, the *Cox* or *Spencer* settlements.

The sole basis petitioners offered the trial court in this case for ignoring the *Cox* and *Spencer* judgments was that those courts did not afford due process to absent class members. Petitioners argued that the trial court here had authority to conduct a complete *de novo* review of the evidence presented to the *Cox* and *Spencer* courts—including a comprehensive factual evaluation of the sufficiency of the evidence—to make its own determination of the adequacy of the courts' due process rulings on issues such as notice and adequacy of representation.

On January 14, 2002, the trial court granted respondents' summary judgment motions and dismissed the case on the basis of the Full Faith and Credit Clause. The court ruled

that petitioners were bound by the prior settlements and rejected petitioners' arguments that the South Carolina courts were entitled to disregard the findings and determinations of the courts of sister states. The trial court concluded that it was not allowed "to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit." Pet. App. 42a. The court then determined that "[t]he record unmistakably shows that the [*Cox* and *Spencer*] courts fully considered all due process issues relating to its jurisdiction over absent class members." *Id.*

On January 12, 2004, the South Carolina Supreme Court affirmed, holding that:

> [D]ue process requires that an absent class member's rights are protected by the adoption and utilization of appropriate procedures by the certifying court; thereafter, the merits of the certifying court's determinations are subject to direct appellate review. As for collateral review, however, due process does not afford any "second-guessing of those determinations."

Id. at 18a (quoting *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir.) *cert. denied*, 528 U.S. 1004 (1999)).

The South Carolina Supreme Court concluded that it was not to consider *de novo* whether, for example, the rendering court had provided adequate notice to absent class members. Rather, it held that its role was to determine whether the rendering court had itself properly considered the issue and had done so in a manner that comported with due process.[6] *Id.*

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[6] Similarly, other courts have rejected collateral challenges to the *res judicata* effect of the *Cox* and *Spencer* settlements, according them full faith and credit. *See Hop v. Hoechst Celanese Corp.*, No. 4390 (Wis. Cir. Ct. Mar. 28, 1996); *Fry v. Hoechst Celanese Corp.*, No. 96-2615 (Fla. 5th

REASONS FOR DENYING THE PETITION

This case does not require this Court's review. Contrary to petitioners' suggestions (Pet. 3), this case does not present the Court with an opportunity to address *Stephenson*. *Stephenson* involved a class action settlement with an unidentifiable group of class members whose future claims were extinguished by the settlement but who were denied recovery under it. Thus, *Stephenson*—unlike this case—starkly presented the question whether a class action settlement that would be reversed on direct appeal under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), was nonetheless entitled to full faith and credit in a collateral attack. That question is not presented here, for the *Spencer* and *Cox* settlements do not suffer from the flaws identified in *Amchem* or the other problems alleged in *Stephenson*, and the petitioners are not future claimants whose rights were extinguished, but rather present claimants who chose not to participate in the settlement. Thus, the Court should await a more appropriate vehicle for resolving the issues presented by *Stephenson*.[7]

In any event, petitioners are bound by the prior settlements because the issues they sought to raise in the South Carolina state courts were determined by the courts that approved the settlements in the first instance. The proper place for petitioners to raise these objections was not in a new court—which would be put in the untoward position of second-

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Dist. App. Oct. 10, 1997); *Farr v. RCP Invs.*, No. CV 93-08807 (Ariz. Sup. Ct. Jan. 29, 1996).

[7] Furthermore, if the Court were to grant this petition, it might face the prospect of devoting considerable time and resources to a case that could end with an evenly divided Court. Justice O'Connor has regularly recused herself from cases in which DuPont was a party. *See, e.g., Green Leaf Nursery, Inc. v. E. I. du Pont de Nemours & Co.*, 124 S. Ct. 2094 (2004); *Minus v. E. I. du Pont de Nemours & Co.*, 537 U.S. 1226 (2003); *Stafford v. E. I. du Pont de Nemours & Co.*, 537 U.S. 941 (2002).

guessing the determinations of the courts originally rendering judgment—but rather in the rendering courts themselves. As the court below concluded, under petitioners' proposed approach, "a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially," and this would clearly undermine the interests of finality and constitute "a waste of judicial resources." Pet. App. 16a-17a. Contrary to sound judicial administration, it also would frustrate the ability of parties to enter into binding and conclusive settlements of large class actions, thus requiring unnecessary litigation at great cost to the litigants, the courts, and ultimately the public. And all of this would undermine the very purpose of full faith and credit (and the associated doctrine of *res judicata*): to ensure finality of judgments, including, of course, judgments implementing settlements.

I. THIS CASE IS NOT A SUITABLE VEHICLE TO RESOLVE THE QUESTIONS PRESENTED BY *DOW CHEMICAL CO. v. STEPHENSON.*

Petitioners suggest that this case presents the Court with an opportunity to resolve what they claim is a conflict among the federal circuits and state courts of last resort regarding the extent of collateral review upon a challenge by absent, out-of-state class members to a state-court class action settlement. Pet. 3. Specifically, petitioners assert (*id.* at 2-3, 9) a conflict between the court below and the Ninth Circuit in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999), on the one hand, and *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 511 (2003), and *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), on the other.[8] Petitioners are wrong. This case does not provide

[8] Petitioners also assert (Pet. 2) that the decision below conflicts with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). But *Amchem*

the Court with a viable opportunity to resolve the issues left unresolved as a result of the evenly divided Court in *Stephenson*.

1. As shown below, the reasons present in *Stephenson* for granting certiorari are not present here. *Stephenson* must be understood in its context. In 1984, a class settlement had been reached in litigation filed against manufacturers of Agent Orange that purported to resolve all Agent Orange claims and created a compensation program that paid claimants for the next ten years, and pursuant to which no payment would be made for death or disability occurring after December 31, 1994. As part of the settlement, all class members—defined to include all persons exposed to Agent Orange, whether or not sick at the time—released their claims against the defendants. *Stephenson*, 273 F.3d at 252-53.

The claims at issue in *Stephenson* were filed in the late 1990s by Vietnam veterans alleging injuries from exposure to Agent Orange. *Id.* at 255. Their injuries manifested themselves only after the ten-year compensation program under the prior class settlement had ended, and therefore they could not recover under that settlement. *Id.* Defendants moved to dismiss the plaintiffs' claims on the grounds that they were barred by the 1984 class settlement, and the trial court

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was a case heard on *direct appeal* of a class action settlement—not, as here, a collateral attack—and *Amchem* therefore neither resolved nor even discussed whether it applied retroactively in a collateral proceeding. Moreover, *Amchem* involved an interpretation of Fed. R. Civ. P. 23, which as noted below (*infra*, at 15-16) is not binding on the proper interpretation of Alabama's and Tennessee's class action rule. Indeed, the Court in *Amchem* expressly reserved the constitutional issue of the adequacy of the class action procedure applied in that case. *See* 521 U.S. at 628. For these reasons, *Amchem* does not state a constitutional rule applicable in this case. In any event, whether the decision below is in accord with the principle now established in *Amchem* involves a fact-bound question about which petitioners seek mere correction of error.

granted defendants' motion. Plaintiffs appealed, contending that they were inadequately represented in the class action.

The Second Circuit reversed, resting its decision on the fact that the district court, in certifying a settlement class, had not addressed the adequacy of representation for those members of the class, including the *Stephenson* plaintiffs, whose injuries manifested themselves only after the depletion of the settlement fund but whose claims nonetheless were extinguished. *Id.* at 257-58. In other words, the fatal flaw in the settlement, according to the Second Circuit, was its failure (under *Amchem*) to provide adequate representation to a subclass of unidentifiable class members without present injuries who received no benefit from the settlement, because their future injuries occurred after payments ended, but whose claims nevertheless were released by the settlement. *Id.* Given the marked conflict between the interests of current and future claimants, the adequacy of class representation as to the *Stephenson* plaintiffs, in the Second Circuit's view, could not have been "fully and fairly" litigated in the settlement court. *See id.*

This Court subsequently granted certiorari to address the question of the *res judicata* effect of the prior settlement in these unique circumstances. The Court ultimately affirmed by an equally divided vote. *See Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003).

Contrary to petitioners' suggestion (Pet. 3), the petition here does not provide the Court with an opportunity to resolve the legal issue left open in *Stephenson*.

First, this Court faced in *Stephenson* a class action settlement that exhibited the very flaw previously identified in *Amchem*, 521 U.S. at 626-28. As the Court explained, "it is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate

representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). The Agent Orange settlement plainly failed under the *Amchem* standard. This Court, therefore, was squarely presented with the question of whether a class settlement that would be reversed on direct appeal under *Amchem* should nonetheless be accorded full faith and credit in a collateral attack.

The *Amchem* flaw, however, is not present in the *Cox* and *Spencer* settlements. In contrast to *Stephenson*, the *Cox* and *Spencer* settlements do not cut off the claims of future claimants while assuring recovery for current claimants. Instead, both settlements have "soft caps" that either require respondents to continue funding for future claims above the cap (thus compensating injured claimants) or allow future claimants later to initiate their own suit (pursuant to a waiver of the statute of limitations). Both settlements also provide the same payments for claims whether made in 1995 when settlement funding began or at some future time. Indeed, class members can recover under the *Spencer* settlement whether or not they have suffered any leaks or other injury. Where present and future claimants will receive the same benefits (or, if they do not, their claims—which have been tolled—will survive intact), there is no conflict between current and future claimants of the kind at issue in *Stephenson*.[9] For all these reasons, this case does not provide the Court with an opportunity to resolve the legal questions presented by *Stephenson*.[10]

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[9] Petitioners' assertion (Pet. 27) that some class members were unaware that they owned polybutylene pipes, and that they were therefore inadequately represented, is unavailing. The presence of polybutylene pipes can be determined readily, and all class members were eligible immediately for recovery under the *Spencer* settlement, whether or not they suffered a leak or failure resulting in property damage.

[10] Petitioners' generalized claims of inadequate representation (Pet. 24-29) do not implicate the issues in *Stephenson*. And petitioners' arguments

Second, this case more closely resembles the Second Circuit's earlier decision in *In re "Agent Orange" Products Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993) *cert. denied*, 510 U.S. 1140 (1994) ("*Ivy/Hartman II*"), than *Stephenson*. As noted above, the plaintiffs in *Stephenson* became ill only *after* expiration of the 10-year payment period and received no recovery under the settlement. By contrast, the *Cox* and *Spencer* settlements include soft caps that ensure that funds will be available to all claimants or that their claims will otherwise be preserved. Moreover, the *Spencer* settlement entitles petitioners to make claims for a 15-year period

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are unavailing in any event. First, petitioners complain (Pet. 5, 25-26, 27) that class counsel withdrew their objections to the *Cox* settlement in exchange for the payment of additional attorneys' fees. Neither Judge Silver (who conducted a mediation regarding the settlements), the *Cox* and *Spencer* courts, the trial court in the instant case, the South Carolina Supreme Court, nor any other court evaluating the *Cox* and *Spencer* judgments, found this distribution of fees objectionable or inappropriate. Second, petitioners suggest (Pet. 6, 24, 29) that one class attorney inappropriately settled a private inventory of claims at amounts purportedly greater than class members received. But the *Cox* court specifically rejected the argument that petitioners now advance, ruling that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." Pet. App. 59a n.10. Judge Silver likewise addressed these concerns, noting that he was "particularly sensitive" to the issue of individual settlements during negotiations and that he would not allow the subject of individual settlements to enter into negotiations. In particular, Judge Silver stated that "in no way would I permit [the attorney representing individual plaintiffs], nor did he ever try, to condition class settlement on his settlement." Pet. App. 58a-59a n.10. In *Amchem*, by contrast, the parties explicitly linked settlement of class and individual claims. 521 U.S. at 600-01. Finally, petitioners' complaint (Pet. 25-26) that homeowner class representatives could not provide adequate representation for commercial business is unfounded, and at any rate unlike the inherent structural flaws found in *Stephenson*. The *Spencer* settlement pays the same 10% of a replumb and damage caused by leaks, whether the property at issue is a home or a commercial business, and whether the cost of the replumb is $2,000 or $200,000.

after installation. Petitioners have not asserted—either here or below—that they do not fall within this 15-year window.[11] Thus, petitioners are not in the same situation as the plaintiffs in *Stephenson*. Rather, their position is akin to that of the plaintiffs in *Ivy/Hartman II*, whose Agent Orange-related injuries became apparent during the 10-year settlement period. In contrast to its holding in *Stephenson*, the Second Circuit *rejected* the collateral attack by the *Ivy/Hartman II* plaintiffs, holding that it was unnecessary to create a subclass of future claimants who became ill within 10 years after the settlement, precisely because the settlement covered such claims. *Ivy/Hartman II*, 996 F.2d at 1436. In *Stephenson*, the Second Circuit reaffirmed its holding in *Ivy/Hartman II*. *See Stephenson*, 273 F.3d at 257-58, 260 n.7. Thus, the Second Circuit would accord full faith and credit to the *Spencer* and *Cox* settlements under *Ivy/Hartman II*. For this reason, petitioners err in claiming that the Second Circuit is in conflict with the decision below on the facts of this case. Pet. 2.

Third, this case does not present the *Stephenson* issues for a more fundamental reason. The class-action settlement collaterally attacked in *Stephenson*, like that challenged on direct review in *Amchem*, was approved in federal court subject to Fed. R. Civ. P. 23. The holding in *Amchem* was based not on the Constitution but on the Court's interpretation of Fed. R. Civ. P. 23. Indeed, in *Amchem*, this Court specifically reserved the only constitutional question presented—whether notice to the class was constitutionally deficient. *See* 521 U.S. at 628. Thus, the *Amchem* holding was *not* binding on the *Spencer* and *Cox* settlement courts interpreting the state class action procedural rules; more to the point, it is not relevant to the South Carolina courts' application of full faith

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[11] Moreover, Delrin® was not sold for use in these plumbing fittings until 1983, and petitioners intervened in the instant case in 1996. Therefore, petitioners' claims necessarily fell within the 15-year window at the time petitioners intervened in this case.

and credit and due process principles to the *Spencer* and *Cox* judgments. In order for the Court even to address the full faith and credit issues present in *Stephenson* and asserted by petitioners, the Court first would be required to decide the constitutional question reserved in *Amchem*, and then determine whether any constitutional violation it identified could be asserted retroactively in a collateral attack of a class action judgment. Given the absence of direct constitutional authority, the Court would also be faced with the question whether the full faith and credit standard for collateral attack varied depending on whether the constitutional violation in the prior judgment was established by previous decision or would be a new rule of constitutional law. *Cf. Teague v. Lane*, 489 U.S. 288 (1989). These complex legal issues were neither raised in the petition nor passed on by the South Carolina Supreme Court. Nor does the petition suggest they are ripe for this Court's review. Accordingly, this case is not an appropriate vehicle for the Court to try to reach the *Stephenson* issue.

2. Petitioners' reliance on *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003), as establishing a division in authority (Pet. 9) also is unavailing. Indeed, the Vermont Supreme Court expressly found it unnecessary to reach the issue of the proper scope of review for a collateral attack on a class action settlement (*Homeside Lending*, 826 A.2d at 1017)—exactly the question petitioners seek to raise here.

The Vermont Supreme Court described the settlement considered in *Homeside Lending* as "notorious." *Id.* at 999. The specific facts presented there made it easy to find that the settlement could not be given full faith and credit. Although not clear from the class notice of the settlement, and certainly not considered or known by the court that approved the settlement, many class members ended up paying more to their purported class counsel by way of attorneys' fees than they received by way of benefits. *See id.* at 1002 n.4. In other words, class members took a net loss—a position that clearly

put class counsel at odds with the class they purported to represent. This result was hidden from the settlement court and the recipients of the class notice. *Id.* at 1010-12.

The Vermont Supreme Court noted that when a settlement takes away, rather than grants, net benefits, the liberalized standards for judging adequate notice and proper representation associated with a *plaintiff* class (under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)) do not apply. As the court observed, "the position of many of the class plaintiffs was closer to the defendant as described in the *Shutts* opinion." *Homeside Lending*, 826 A.2d at 1008; *see also id.* at 1011 ("absent class members were actually in a defendant class"). Accordingly, the more rigorous due process standards associated with imposing liability on a defendant, *see Shutts*, 472 U.S. at 808, were necessary.

Moreover, the class representatives in *Homeside Lending* did not suffer the same net loss as the rest of the class members, because their recovery was enhanced through incentive payments. The appellate court stated it could "think of no more compelling example of inadequate representation," because "[t]he normal conflict of interest of class counsel with respect to fees was allowed to take away most or all of the economic benefit of the litigation for class members."[12]

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[12] Petitioners' claim that *Cox* and *Spencer* involved a similar conflict over attorneys' fees between the class and class counsel, allegedly because "[t]he funding for the extra attorneys' fees came from the reduction in class proceeds" (Pet. 5-6, 28), is baseless. Because of the "soft caps," there is no limit on the funding available to satisfy the claims of class members, and nothing was taken away from class members and given to their attorneys. Petitioners' assertion that the *Cox* and *Spencer* settlements deserve a more searching review because (as in *Homeside Lending*) defendants supposedly participated in the actions of class counsel that are alleged to be inadequate representation (Pet. 16-17) also springs from this baseless claim (which is refuted in detail in footnote 10, *supra*). Further, because petitioners did not raise this argument below, it is not properly presented here.

Homeside Lending, 826 A.2d at 1016. It was in these circumstances that the Vermont court found that it was unnecessary to determine the proper scope of review for a collateral attack on a class settlement. *See id.* at 1017. Because *Homeside Lending* bears no similarity to this case—there has been no suggestion of a net loss to any class members here as a result of the settlements—there is no conflict between the court below and the Vermont court.

3. In any event, petitioners have overstated significantly the degree of tension between the Second Circuit and the Vermont court, on the one hand, and the Ninth Circuit and the court below, on the other. The most that can be said accurately about *Stephenson* and *Homeside Lending* is that they provide some further elaboration beyond *Epstein* of the controlling standard where there are unique circumstances not present here. Notably, neither case applies any standard different from that applied in *Epstein*, and neither court rejected the *Epstein* standard. Indeed, in each case the court found that the particular judgment before it would not be entitled to *res judicata* effect even under the Ninth Circuit's standards. *See Stephenson*, 273 F.3d at 258 n.6 ("Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard."); *Homeside Lending*, 826 A.2d at 1016-17 (concluding that the Ninth Circuit would have denied full faith and credit under *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992)).

II. THE SOUTH CAROLINA SUPREME COURT PROPERLY ACCORDED FULL FAITH AND CREDIT TO THE *COX* AND *SPENCER* JUDGMENTS.

Petitioners also are wrong in arguing that the South Carolina Supreme Court erred in according the *Cox* and *Spencer* settlement judgments full faith and credit. Pet. 2. Under settled precedents of this Court, when a previous state-

court class action settlement is collaterally attacked, the reviewing court is not required to review *de novo* the due process analysis of the settlement court. In any event, no matter what standard is applied, the *Cox* and *Spencer* settlements readily satisfy due process.

A. Due Process Does Not Require A State Court's Full Faith And Credit Analysis To Include *De Novo* Review Of The Due Process Inquiry Conducted By The Settlement Court.

This Court's cases have clearly delineated the due process analysis that a settlement court must conduct in order to validate a nationwide class action settlement capable of binding absent class members without actual notice of the action. *See Shutts*, 472 U.S. at 811-12. That analysis requires an inquiry into the facts and circumstances of a particular case and settlement to determine, for example, whether the notice given was reasonable and the best practicable, or whether more was required. In addition, the court must exercise judgment in determining whether the interests of absent class members were adequately represented by those parties participating in the lawsuit. The trial court's evaluation of such matters is clearly subject to scrutiny on direct appeal, and ultimately to review by this Court on certiorari.

Petitioners contend, however, that a different court, asked to consider whether the prior judgment and settlement should be given *res judicata* effect in a subsequent suit, ought to consider *de novo* issues such as the adequacy of notice or representation. Pet. 16-17. Under petitioners' theory, notwithstanding that the settlement court conducted its own inquiry according to the standards set by this Court, a second court is free to ignore or "second-guess," *Epstein*, 179 F.3d at 648, the settlement court's approach and conclusions. In petitioners' view, the fact that the record establishes that the settlement court considered and evaluated the due process issues, and applied the proper analysis (drawn from this

Court's cases), should not prevent a subsequent court from considering these issues anew and drawing a different conclusion if it sees fit.

Petitioners' approach would have devastating and far-reaching implications. Where a due process issue is properly raised in the original proceeding, the presiding court has the opportunity to address and correct any problem. Where the issue is raised only in a subsequent proceeding, the settlement court no longer has the ability to make any correction. The second court's only option is to deny effect to the prior judgment, and thus destroy the fundamental benefit for which the defendant bargained—peace and finality.[13] Moreover, upon denying effect to the earlier settlement, the second court is apparently free to proceed with its own class action, according to its own standards, potentially exposing the defendant to massive additional liability.

Petitioners' theory has not been accepted by any court. To the contrary, as explained above, the two cases cited by petitioners involved unique circumstances and distinct legal concerns that have no bearing here. As recognized by the South Carolina Supreme Court in this case, following a thorough analysis of the decisions on the issue, a collateral attack on a prior judgment or settlement is limited to the assertion that the settlement court did not provide adequate procedures for addressing the due process issues:

> As for collateral review, however, due process does not afford any "second-guessing of those determinations." Instead, what this limited review entails is "an examination of *procedural* due process and nothing more."

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[13] It is not only defendants, but also class members, who would be adversely affected were petitioners' arguments adopted. For example, DuPont's obligations under the *Spencer* settlement are terminated *for all class members*, not just petitioners here, if the settlement is denied preclusive effect.

Pet. App. 18a (citations omitted) (emphasis in original); *see also Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (relying on whether "[t]he [settlement] court found that the notice procedures met the requirements of the applicable Minnesota Rule of Civil Procedure and comported with due process requirements"); *Epstein*, 179 F.3d at 648 ("[d]ue process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court"); *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 420 (Ohio Ct. App. 2000) ("[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but rather, by the application of appropriate procedures in the certifying court"). Under the cases, the question is whether the settlement court was attentive to the procedures concerning class notice and representation, not whether the second court would resolve those issues in the same way as the settlement court.

In developing these principles, the lower courts have closely adhered to principles set forth in this Court's cases. This Court has long held, for example, that:

> a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.

Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982). The Court elaborated on these principles in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 (1982), explaining that in order for its judgment to be entitled to full faith and credit, a state court "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." Full faith and credit is accorded unless "there is reason to doubt the quality, extensiveness, or

fairness of *procedures* followed in prior litigation." *Id.* at 481 (quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)) (emphasis added). Thus, as long as the reviewing court is satisfied that the state court had in place and adhered to procedures to protect the parties' due process rights, the state court's judgment is binding in other courts and not subject to collateral attack. Both *Underwriters* and *Kremer* rejected the type of *de novo* factual review that petitioners urge here.

In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), this Court applied these principles to a class action settlement. The Court noted at the outset that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act." *Id.* at 374. In reversing a contrary ruling by the Ninth Circuit, this Court did *not* engage in a *de novo* review of the facts before the settlement court to determine whether due process had been afforded absent class members. Rather, *Matsushita*'s holding was "explicitly and implicitly premised upon the validity of the Delaware judgment." *Epstein*, 179 F.3d at 644. Thus, in *Matsushita*, this Court highlighted that the Delaware Court of Chancery had made an "express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class," and that "the Court of Chancery found, and the Delaware Supreme Court affirmed" that the requirements of due process were satisfied. *Matsushita*, 516 U.S. at 378-79 & n.5. On remand from that decision, the Ninth Circuit recognized this Court's direction that absent members' due process rights are "protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations" rather than by "collateral second-guessing of those determinations and that review." *Epstein*, 179 F.3d at 648.

The same reasoning employed by the Ninth Circuit in *Epstein* (on remand from *Matsushita*) has been utilized by other courts asked to give *res judicata* effect to a prior class settlement.[14] It was likewise followed in this case by the South Carolina Supreme Court.

Petitioners' critique of the approach taken below (including adoption of the *Epstein* analysis) (Pet. 16-17) is misdirected. For the most part, petitioners lose sight of the issue that they present for review by relying on cases involving direct review of a settlement. *See* Pet. 3, 11-12, 23-24 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)).

Petitioners assert that "[t]he only reasonable avenue for an absent class member to test whether due process has been accorded is through collateral attack." Pet. 2-3. In so asserting, petitioners ignore the most direct avenue available for considering objections to a class action settlement—direct recourse to the court rendering the judgment, followed by direct appellate review, and, if necessary, a petition to this Court.[15] The failure to appear in the original action cannot serve as a basis for mounting a collateral challenge to that action. As this Court stated in *Kremer*, "[t]he fact that [peti-

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[14] *See, e.g., Reppert*, 359 F.3d at 57; *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560-61 (3d Cir. 1994); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 (8th Cir. 1993); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991); *King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 529-30 (6th Cir. 1986); *Epstein v. Matsushita Elec. Indus. Co. (In re MCA, Inc. Shareholder Litig.)*, 785 A.2d 625, 628 (Del. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Fine*, 743 N.E.2d at 420-21.

[15] Moreover, as explained *infra*, these principles apply even with respect to absent class members who did not receive actual notice of the settlement.

tioner] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." 456 U.S. at 485. And, as the Court said in *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), "there has been a failure of due process only in those cases where it cannot be said that *the procedure adopted* fairly insures the protection of the interests of absent parties who are to be bound by it." (Emphasis added).

Precisely because the relevant issues can be addressed in the settlement court, the ordinary and proper way to review a determination that affects one's rights is by presenting one's objections in that court. So long as the settlement court took steps to determine that notice was provided in a manner that satisfies due process standards, and that the interests of the absent party were fairly represented by those who were before the court as class representatives (or as objectors), an absent party has no right to mount a collateral attack on the judgment. Indeed, in the class action setting, the court may properly rely on those parties who do appear in the action, and who act as representatives or objectors, precisely because the commonality of interests—which must be assessed by the settlement court—provides the assurance that all legitimate interests have been addressed and accommodated.

Petitioners also err in asserting that the Supreme Court of South Carolina improperly relied on mere "recitals" or "conclusory recitals" in *Cox* and *Spencer* that the class was provided with adequate notice and representation. Pet. 13-14, 22, 25. Petitioners' characterization of the other courts' efforts as "recitals" does not accurately reflect either the scope of the inquiry conducted by the *Cox* and *Spencer* courts or the decision of the court below. As demonstrated above, both the *Cox* and *Spencer* courts fully considered the questions of notice and representation under applicable constitutional principles. Moreover, the South Carolina Supreme Court and the trial court looked beyond the words used by the

settlement courts for actual use of appropriate procedures in *Cox* and *Spencer*. Pet. App. 19a-22a, 25a-26a, 46a-50a, 42a-55a, 57a-60a. Thus, even in the event that a more searching inquiry were required upon a clear showing that a settlement court acted merely as a rubber stamp, that was not the case here. The settlement courts understood the nature of the due process requirements, the notice provided was extensive and well-considered, and the courts (and parties) were attentive to and met the due process requirements.

B. Even If Petitioners Did Not Receive Actual Notice of the *Cox* and *Spencer* Class Settlements, They Are Bound By The Judgments In Those Cases.

Much of petitioners' argument hinges on the notion that because they purportedly did not receive actual notice of, and did not appear in, *Cox* and *Spencer*, they should not be bound by those settlements and judgments.[16] Pet. 13, 15, 22. This is incorrect under this Court's precedents. Actual notice is *not* required to bind class members to a class action judgment.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court explained that actual notice is not required in every instance. To the contrary, what due process requires is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

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[16] Among other reasons, petitioners claim that notice was deficient because it was not targeted to owners of multi-unit complexes. Pet. 6. To the contrary, the notice program included targeted mailings to numerous multi-unit membership organizations, as well as industry publications. Petitioners also assert that notice should have been sent to individuals listed in the database maintained by the Plumbing Claims Group ("PCG"), which is an entity organized and funded by Shell, Celanese and DuPont to resolve claims of property owners outside of litigation. Pet. 6, 21, 22. But the PCG database contained individuals whose claims had *already* been made and addressed by respondents (many of whom had signed releases in favor of respondents).

the action and afford them an opportunity to present their objections." *Id.* at 314. *Mullane* and its progeny established that due process requires no more than notice that is reasonable and appropriate given "the practicalities and peculiarities of the case."[17] *Id.*

The *essence* of the modern class action is the ability to bind absent class members, provided that due process requirements are satisfied. *See Shutts*, 472 U.S. at 811-12 (state court may exercise jurisdiction over non-resident members of plaintiff class as long as the court provides minimal procedural due process protection in the form of notice, an opportunity to be heard and participate, and a right to opt out from the class); *see also Hansberry*, 311 U.S. at 40-41 (class action is exception to the rule that one cannot be bound by judgment *in personam* in a litigation unless one was made a party in the traditional sense).

Indeed, *Shutts* makes clear that the due process standard for reasonable notice varies depending on whether such notice is provided to plaintiffs or defendants. *Shutts*, 472 U.S. at 811. In determining the extent of the required efforts to notify absent class members, the Due Process Clause permits courts to take cognizance of the fact that the very basis for the development of the class action device is to provide a recovery to potential plaintiffs when individual suits on the same claims are not economically feasible or desirable (from class members' own perspective). *Id.* at 813. In contrast, due process requires more rigorous notice efforts in order to bind defen-

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[17] In many class actions, not all of the absent class members can be identified or located. *Cf. Mullane*, 339 U.S. at 317 ("in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights"). In others, the overwhelming cost of notifying each and every theoretically identifiable class member would not be reasonable in light of the nature and financial dimension of the dispute.

dants, who will not benefit from, but rather will be financially impaired by, the prosecution of a suit. *Id.* at 808.

The nature of a class action assumes that actual notice will not be received by some potential parties in interest. Yet the premise of the class action is that those parties who are not reached by notice, and who do not appear in the action, share common interests with those who do appear, either as class representatives or otherwise. Therefore, even if notice does not reach particular individuals, many others, with virtually identical interests and incentives (as determined by the court), will have received actual notice. Thus, the interests of those parties who did not receive notice will be represented pursuant to a procedure superintended by the courts. It is only in those circumstances, typified by *Amchem*, where some definable subclass is unidentifiable and therefore cannot receive notice, cannot participate in the case, and cannot fairly be represented that due process questions may arise. As explained *supra*, that is not the situation here.

For this reason, petitioners' reliance on *Shutts* for their suggestion that every class member must receive individual notice in order to be bound by a class settlement is wholly misplaced. Pet. 17. *Shutts* echoes the principles set forth in *Mullane* that notice must be the best practicable and be reasonably calculated to inform class members of the pendency of the class action. Individual notice was required in *Shutts* only because the identities of all of the class members—royalty owners possessing rights to leases from which the defendant produced natural gas—were known to the settling defendant. *Shutts*, 472 U.S. at 801.

Finally, petitioners rely on cases like *Martin v. Wilks*, 490 U.S. 755 (1989), *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), for the suggestion that prior class actions will not bind certain individuals. Pet. 11. That is even wider of the mark. Those

cases reflect the elementary proposition that to be bound by a class action, one must be a member of the class. Here, by contrast, it is undisputed that petitioners were members of the *Cox* and *Spencer* classes. These cases, therefore, simply are inapposite.

CONCLUSION

For the foregoing reasons, the petition does not present any issues requiring this Court's review. Accordingly, the petition should be denied.

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June 17, 2004

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Jun. 30, 1995]

Civil Action No. CV-94-074

GARRIA SPENCER, *et al.*,
Plaintiffs,

v.

SHELL OIL COMPANY, *et al.*,
Defendants.

ORDER OF CLASS CERTIFICATION

Plaintiffs have moved for an order pursuant to Rule 23, Alabama Rules of Civil Procedure, that this case may be maintained and certified a class action. On June 19, 1995, the Court heard extensive argument from the parties' counsel and admitted into evidence the parties' evidentiary submissions. The Court finds that there is sufficient proof in the record making it practicable for the Court to rule upon the Plaintiffs' Motion for Class Certification. Ala. R. Civ. P. 23(c)(1). The Court also finds that it has jurisdiction over the subject matter, the parties, and that venue is proper.

The Court is authorized to "make appropriate orders" under Rule 23(d)(1) for the conduct of class actions and to determine the course of the proceedings. The Court also is not bound by the class definition proposed by the Plaintiffs, and may adjust the definition and divide the class into subclasses, if needed. *Ex parte Hayes*, 579 So. 2d 1343, 1345 (Ala. 1991).

For the reasons stated below, the Motion for Class Certification shall be and hereby is GRANTED, and the class defined as follows shall be and hereby is CERTIFIED:

An opt-out plaintiff class as to Defendants, Shell Oil Company d/b/a Shell Chemical Company ("Shell") and Hoechst Celanese Corporation ("Celanese"), who are given notice in accordance with the due process clause of the U.S. Constitution and who are defined as follows:

> All persons and entities who presently own or who come to own before the end of the notice period or who previously have owned any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, provided, however, that the following persons and claims are excluded from the class:
>
> —All claims for personal injury;
>
> —Defendants, all manufacturers of polybutylene pipe, fittings, and/or components of polybutylene plumbing systems, and their parents, subsidiaries, affiliates, or controlled entities, and the officers, directors, agents, and employees of each of the foregoing;
>
> —All governmental entities, municipalities, and public or private water supply systems; and
>
> —All persons or entities who, as of May 26, 1995, have filed an individual non-class, polybutylene plumbing system lawsuit against Shell and/or Celanese, or are members of the class certified in the polybutylene plumbing system class action pending in San Diego County, CA, or are individuals represented by and who shall be identified in writing by the Houston, TX law firm of Fleming, Hovenkamp & Grayson, P.C. or the San Antonio, TX law firm of Montgomery & Associates,

P.C., except that these persons or entities may "opt-into" this class action by a filing with the Clerk no later than ten (10) days prior to the start of trial.

All persons or entities who come to own after the end of the class notice period but prior to trial any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, may "opt-into" this class action at any time by a letter or other document filed with the Clerk no later than ten (10) days prior to the start of trial.

The Court finds that the above class definition, which is substantially in the form proposed by Plaintiffs, is fair and just. The Court further finds that such a class exists and is reasonably ascertainable in this litigation. The Court notes that, if necessary, this class certification may be modified as the case proceeds, including the establishment of subclasses.

I. Introduction

The named Plaintiffs are adult residents from Greene County, Alabama, Texas, and Illinois who own or previously have owned improvements to real property or structures in the United States in which there is or was during the time of such ownership a polybutylene plumbing system, or the components thereof, which was manufactured, designed, supplied, and/or contained materials sold by Defendants. Plaintiffs bring this cause of action pursuant to common law for damages and other relief. Plaintiffs allege that Defendants have committed torts and engaged in wrongful conduct, including breaches of warranty, in connection with the development, design, manufacture, marketing, sale, and

distribution of polybutylene plumbing systems[1] and their components. Specifically, Plaintiffs allege that Defendants Celanese and Shell are liable at law for damages to the class members for allegedly defective polybutylene plumbing systems.

Plaintiffs have settled their claims on a classwide basis with the other Defendant, E. I. DuPont de Nemours and Company ("DuPont"). The Court has preliminarily approved that Settlement. *See* Order No. 1. In Order No. 1, the Court made preliminary findings that the elements of class certification were present for purposes of the DuPont settlement. The Court, however, in considering the pending Motion for Class Certification, has decided to base its decision only on the arguments and evidence submitted by the parties at the certification hearing, rather than rely on the Court's preliminary findings and conclusions in Order No. 1.

As noted, the Court recognizes that a class certification order "may be conditional, and may be altered or amended before the decision on the merits." Ala. R. Civ. P. 23(c)(1); *First Ala. Bank v. Martin*, 381 So. 2d 32 (Ala. 1980). Resolution of the Plaintiffs' Rule 23 class certification motion is committed to the sound discretion of the Court, and the decision will not be overturned except for abuse of discretion. *Marshall Durbin Co. v. Jasper Util. Bd.*, 437 So. 2d 1014, 1026 (Ala. 1983). Plaintiffs bear the burden of proof of establishing that all requirements of Rule 23 have been met. *Ex parte Blue Cross & Blue Shield of Ala.*, 582 So. 2d 469, 477 (Ala. 1991); *Rowan v. First Bank of Boaz*, 476 So. 2d 44, 47 (Ala. 1985).

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[1] Plaintiffs have defined "polybutylene plumbing systems" as follows: "they refer to and include water supply plumbing containing, among other things, pipes fabricated, in whole or in part, from polybutylene, and fittings, including tees, elbows, and couplings, fabricated in whole or in part, from Celcon and/or Delrin acetal copolymer, whether sold and/or installed as a system or separately."

An inquiry into the merits of Plaintiffs' causes of action is inappropriate when making the class certification decision. *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1343 (Ala. 1994). Indeed, the substantive non-class allegations of the Plaintiffs' complaint are taken as true for purposes of deciding the class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). The Court, however, must make specific findings of fact as to the elements necessary for class certification, with Plaintiffs bearing the burden of persuasion. The Court notes that the Plaintiffs and Defendants, Shell and Celanese, have submitted substantial evidentiary materials and presented lengthy memoranda and arguments.

The Court finds it significant that in the *Beeman* case both Shell and Celanese agreed to a nationwide class certification in a Texas state court within the context of a settlement class. The only explanation provided to the Court by Shell and Celanese for their agreement to such in *Beeman* and their vigorous opposition to a nationwide class here was that *Beeman* was a settlement class.

This explanation is suspect at best. First, the same arguments made in opposition to certification here would be just as present in the context of a settlement, e.g., alleged unmanageability, atypicality of claims, differences in damages, and so on. Second, a court should determine on its own whether all the class action requirements are met, regardless of the parties' agreement, and should make specific findings. In requesting a settlement class in *Beeman*, Shell and Celanese were in effect asking that court to make the findings they do not want this Court to make. Finally, although invited by Plaintiffs' counsel to respond, neither Shell nor Celanese denied that they were attempting to settle their polybutylene problems on a nationwide class basis elsewhere.

Alabama Rule of Civil Procedure 23(a) sets forth prerequisites to *all* class actions. The requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all

members individually is "impracticable" [Rule 23(a)(1)]; (2) there are questions of law or fact common to the class [Rule 23(a)(2)]; (3) the claims or defenses of the class representative(s) are typical of the claims or defenses of the class [Rule 23(a)(3)]; and (4) the persons representing the class are able fairly and adequately to protect the interests of all members of the class [Rule 23(a)(4)].

After demonstrating that the Rule 23(a) requirements are satisfied and that an ascertainable class exists, Plaintiffs must *also* satisfy one or more of the elements enumerated in Rule 23(b) for maintaining the suit as a class action. *Eisen*, 417 U.S. at 163. The following element is particularly relevant to the present case: whether the questions of law or fact common to the class predominate over questions affecting the individual class members . . . and, on balance, a class action is superior to other methods available for adjudicating the controversy [Rule 23(b)(3)]. The Court will first analyze the Rule 23(a) requirements and later discuss Rule 23(b).

II. Rule 23(a) Requirements

A. Numerosity

The first requirement, numerosity, is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Ala. R. Civ. P. 23(a)(1). "Impracticable" does not mean "impossible"; Plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class. *In re Domestic Air Transp. Antitrust Litig.*, 677 F.2d at 698 (citing 3 Newberg, Newberg on Class Actions, § 18.03 at 455 (1985)). When the number of class members is large, as it is here, numerosity alone can establish impracticability and the Court need not look to other factors. *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989); *Thillens, Inc., v. Community Currency Exch. Ass'n*, 97 F.R.D. 668, 676-77 (N.D. Ill. 1983). Geographic dispersion of those class members is another signifi-

cant factor in the numerosity determination. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986); *Alvarado Partners, L.P., v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

The Court finds that any argument against numerosity is without merit. First, the record demonstrates that there are as many as six million housing units containing a polybutylene plumbing system. This number was not rebutted or contested by Defendants at the certification hearing. Moreover, the affected housing units and class members are dispersed throughout several states. Obviously, joinder of all putative class members would be impracticable, and result in serious hardship and inconvenience, and likely be impossible. The Court finds that the number of units coupled with the great geographic dispersion satisfies the numerosity requirement of Rule 23(a).

B. Commonality

The second element of Rule 23, commonality, is satisfied if there are some questions of law or fact common to the class. Fed. R. Civ. R. 23(a)(2). Clearly, there are many common issues among class members. For instance, there are common, if not identical, issues of fact relating to the historical development, chemical composition, design, manufacture, and marketing of polybutylene plumbing systems and their raw materials and components, the content and veracity of Defendants' representations, Defendants' claims history, if and when Defendants had notice of a defect, Defendants' documents, the parties' expert testimony, the testimony of Defendants' employees, and the like. There are also numerous common issues of law, including whether Plaintiffs can meet their burden on the elements of their various causes of action, as well as discovery and evidentiary issues of law. The majority of Shell and Celanese's defenses also present issues of fact and law common to the entire class. Therefore,

the Court finds that Plaintiffs have made the required showing of commonality under Rule 23(a)(2).

C. Typicality

Rule 23(a)(3) requires that Plaintiffs demonstrate that the claims or defenses of the class representatives are typical of the claims or defenses of the class. That is, the named Plaintiffs' claims are typical if they arise from the same event, practice, or course of conduct that forms the basis of the class claims, and if they are based on same or similar legal theories. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985).

The Court finds that the class representatives' claims arise from the same course of conduct by Defendants and the same nucleus of operative facts and are based on upon the same legal theories as those of the absent class members they seek to represent. The named Plaintiffs base their claims and the claims of those they seek to represent upon the wrongful and tortious conduct of Defendants as to polybutylene plumbing systems in general, and not as to a singular or specific system in an individual's housing unit. The Court finds that typicality is established because the class representatives must prove the same elements to establish their causes of action that the absent class members would need to prove to establish their causes of action if they brought individual claims against the Defendants. *In re South Central States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 416 (M.D. La. 1980). Accordingly, the typicality requirement for class members is satisfied.

D. Adequate Representation

The final requirement of Rule 23(a) is that the persons and counsel representing the class must be able fairly and adequately to protect the interests of all members of the class. Unquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action.

The Court is very familiar with the legal capabilities of Mr. Chestnut, Mr. Frazer, Mr. Whatley, Mr. Kuykendall, and Mr. Drake and find that their advocacy in this case and in other cases before this Court is and has been excellent.

Shell and Celanese, however, argue that Mr. Fleming is inadequate due to his representation of thousands of absent class members who are excluded by the class definition, as well as Mr. Fleming's opposition to the *Beeman* settlement class in Houston, Texas. These Defendants also contend that there is a conflict between the claims of Mr. Fleming's individual clients and the class members and that these supposed divergent interests prevent the same counsel from adequately representing the class.

The Court finds that there is no merit to these "inadequacy" arguments. Mr. Fleming and his law firm have an unblemished record of success in polybutylene plumbing litigation. His opposition to the *Beeman* settlement was motivated by his belief that the *Beeman* settlement was a "sweetheart deal" and thus unfair and inadequate for the class. He provided a very credible explanation for excluding his individual clients from the class, and the Court does not see any conflict in that regard, especially since Mr. Fleming represented that he may "opt-in" some or all of these clients through the "opt-in" provision suggested by the Plaintiffs. Additionally, Mr. Fleming's litigation performance in this case has been nothing but professional. The Court is convinced that Mr. Fleming will adequately and vigorously represent the class.

The test for adequacy of class representation focuses on whether the interests of the class representatives conflict with those of the class, and whether the class representatives will competently represent the interests of the class. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Shell and Celanese's attempted attack on the merits of the named Plaintiffs' claims is not a subject for consideration at the class certification

stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court finds that the named class representatives will fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class.

The Court also finds that Celanese's argument, that some of the putative members may not have Celanese's product in their housing units, is without merit. With respect to numerosity, commonality, and typicality, Plaintiffs are not required at this stage to prove that all of the putative members of a class are actual members. *Carpenter v. Davis*, 424 F.2d 257 (5th Cir. 1970). It is noteworthy that the named Plaintiffs may be supplemented or replaced by others at any stage of the litigation. *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994).

Defendants also assert that the Plaintiffs are not typical or adequate representatives of absent class members due to differences in their damages. Courts have generally declined to consider conflicts or differences in damages as sufficient to defeat the adequacy requirement. *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975). This is especially true when the class representatives and class members have a common interest in establishing liability against the defendants, as they certainly do here. Any conflict as to damages is merely theoretical at this point and is insufficient to defeat class certification. Accordingly, the Court is satisfied that Plaintiffs have established the adequate representation element of Rule 23(a)(4).

Accordingly, the named Plaintiffs are hereby appointed as class representatives to represent the class. Accordingly, the following attorneys are hereby appointed lead class counsel: J.L. Chestnut, Jr., T. Roe Frazer II, Joseph R. Whatley, Jr., Frederick T. Kuykendall III, George M. Fleming, and R. Jackson Drake.

For the foregoing reasons, the Court finds that Plaintiffs have satisfied each of the four requirements of Rule 23(a).

III. Rule 23(b) Requirements

After establishing that the requirements of Rule 23(a) are satisfied and that an ascertainable class exists, Plaintiffs must also satisfy one or more of the elements enumerated in Rule 23(b).

The Plaintiffs seek certification pursuant to Rule 23(b)(3) which requires that common questions predominate over individual questions and that a class action be the superior method of adjudicating the controversy. The Court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The issues affecting individual members pale in comparison to the numerous questions of law and fact common to all class members. That there may be some differences in applicable law and damages can be taken care of through a properly drafted case management order and/or jury charge.

Defendants argue that this class action would be unmanageable because proof of injury will require a multitude of individualized examinations. The Court is not persuaded that this case will require "mini-trials" on the issue of damages. The class action is not unmanageable. Proof of liability in this case can be established through common evidence, and damages can be proven largely using objective data and will not involve thousands of separate "mini trials" involving lengthy individual examinations of numerous class members. Furthermore, as the court held in *In re Asbestos School Litigation*, 104 F.R.D. 422, 432 (E.D. Pa. 1984), *aff'd in part, vac'd in part on other grounds*, 789 F.2d 996 (3d Cir. 1986), "the 'overwhelming weight of authority' holds that the need for individualized damages calculations does not diminish the appropriateness of class certification where com-

mon questions as to liability predominate." Several courts have certified nationwide class actions presenting much more challenging manageability issues than this case. *See, e.g., In re School Asbestos Litig., supra; Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *In Re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). In *In Re Domestic Air Transp. Antitrust Litig.*, for example, the court certified a class action involving millions of class members and over 400 million transactions. 137 F.R.D. at 693.

Finally, the Court must determine whether the class action is the superior method of dealing with this controversy. If the question is close, courts should err in favor of class certification in order to protect the judicial system from repetitive litigation. There is no real question that a class resolution is much more favorable than individual trials which would be grossly repetitive of the common issues of fact, law, and liability.

The Court finds that if the class is not certified it is possible that many claims will not be pursued because the costs will exceed the possible recovery and because many class members may never know of their potential claims. Accordingly, the Court finds that a class action is a superior method of adjudicating this controversy for many good reasons, including: (1) any interest of class members in individually controlling the prosecution of separate actions is outweighed by the comprehensiveness and speedy resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the class have failed to result in relief to the overwhelming majority of class members, even in spite of the successful nature of that litigation; (3) it is desirable to concentrate the litigation of the claims in one forum; and (4) the Court foresees no peculiar or insurmountable difficulties likely to be encountered in the management of this class action.

The Court further finds that Plaintiffs have satisfied the requirements of Rule 23(b)(l)(A), as there is a risk that separate actions will be brought if a class action is not permitted. Numerous class actions have been filed in other states, and there will likely be more filed as well as numerous individual actions if a class action were not certified in this case. This likely would lead to the Defendants being exposed to inconsistent and varying adjudications, and potential incompatible standards of conduct.

IV. Notice

The Plaintiff's counsel are directed to provide the Court with a proposed notice, proposed notice plan, and proposed notice order as soon as is practicable following the entry of this Order. The notice and notice plan must be consistent with Rule 23, Alabama law, and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The Court has not been cited to enough authority to justify requiring Shell and Celanese to pay for the notice. The Court thus finds that Plaintiffs and/or Plaintiffs' counsel shall be responsible for paying for the notice and a ensuring that the notice is disseminated in accordance with the notice plan to be approved by the Court. The Court, however, finds that in the interest of resource conservation the notice of this class certification, in Plaintiffs' counsel's discretion, may be included in and incorporated into the notice to be disseminated of the DuPont settlement.

V. Conclusion

For the foregoing reasons, it is ORDERED that Plaintiffs' Motion for Class Certification is GRANTED and the class defined hereinabove is CERTIFIED.

IT IS FURTHER ORDERED that Shell and Celanese's separate motions to strike shall be and hereby are denied.

IT IS FURTHER ORDERED that Shell and Celanese's motions and requests to continue and/or adjourn the certification hearing are DENIED as moot.

IT IS FURTHER ORDERED that Shell's motion to reconsider Order No. 1 preliminarily approving the DuPont settlement shall be and hereby is DENIED.

SO ORDERED, this 30th day of June, 1995.

/s/ Eddie Hardaway, Jr.
EDDIE HARDAWAY, JR.
CIRCUIT COURT JUDGE

APPENDIX B

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Nov. 17, 1995]

Case No. CV-94-074

GARRIA SPENCER, *et al.*, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; E.I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT AGREEMENT AND DISMISSING CLASS ACTION WITH PREJUDICE AGAINST E. I. DU PONT DE NEMOURS AND COMPANY

The motions of class counsel and defendant E. I. du Pont de Nemours and Company ("DuPont") for final approval of class action settlement ("DuPont Settlement") was heard this 17th day of November, 1995.

1. Garria Spencer, et al. instituted this Action by Complaint dated November 16, 1994, individually and on behalf of others similarly situated, against DuPont and other defendants claiming that defendants were liable for alleged defects in polybutylene plumbing systems. On May 4, 1995 plaintiffs and DuPont executed a Settlement Agreement and Stipulation dated June 27, 1995 which provide for settlement of this Action and an order dismissing this Action with prejudice, subject to approval of this Court. On May 12,

1995, class counsel and DuPont filed a joint motion for preliminary approval of the DuPont Settlement. Under the terms of that Settlement, DuPont agreed to reimburse homeowners for eight percent of the cost of replacement of their polybutylene plumbing system and eight percent of unreimbursed property damage. DuPont agreed to pay this amount without regard to whether a class member has yet suffered a leak in their polybutylene plumbing system; regardless of when the plumbing system was installed; and regardless of whether the plumbing system contains any of DuPont's acetal resin, Delrin.

2. After conducting a hearing, on May 25, 1995, the Court issued its Order Granting Preliminary and Conditional Approval of the DuPont Settlement.

3. Thereafter, notice in a form approved by the Court was disseminated to the class. The notice was sent via first class and by means of a massive national media campaign.

4. The Court ordered deadline to opt out of the DuPont Settlement expired on October 27, 1995. The Court ordered deadline to file objections to the DuPont Settlement expired on October 27, 1995.

5. The Court has been informed that, based upon negotiations occurring subsequent to the dissemination of the notice to the class, DuPont has agreed to raise its percentage contribution to the class for replumbs and damages from eight percent to ten percent. No other significant terms of the DuPont Settlement affecting the rights of the class have changed.

NOW THEREFORE, IT IS ORDERED:

6. The Settlement Agreement between Plaintiffs, on behalf of themselves and as representatives of the Settlement Class (as defined in paragraph 8 hereof) , and DuPont dated May 4, 1995, as subsequently modified by stipulation, is fair, ade-

quate and reasonable to the Plaintiffs, the members of the class, and DuPont. The Settlement Agreement is hereby formally approved in all respects and the parties are hereby ordered to consummate and perform its terms.

7. The Court finds that the form of notice satisfies the requirements of Rule 23 of the Alabama Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment in that it fairly and accurately described the pending Action and the DuPont Settlement. The notice advised class members of their right to be excluded from the class and that those who do not timely request exclusion would be bound by the judgment. The notice also advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont Settlement. Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein.

8. All conditions to the DuPont Settlement have been met. The Court, therefore, removes the conditional nature of its certification of the class and hereby enters a binding, final certification of a plaintiff settlement class ("Settlement Class") consisting of the following:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutylene plumbing system with plastic insert fittings made of acetal resin ("polybutylene plumbing system").

Excluded from the Class are:

> a. All persons who, in accordance with the terms of the Settlement Agreement and the Notice to the Class, have executed and mailed or submitted a timely request for exclusion from the Class;

b. The defendants, any and all manufacturers of polybutylene pipe, fittings and/or components of any and all polybutylene plumbing systems, the parent and any subsidiary, affiliate, or controlled entity of any of them, and the officers, directors, agents, and employees of each of them; all persons that have only yard lines as opposed to a polybutylene plumbing system;

c. All persons who as of May 12, 1995: (i) have pending an individual non-class lawsuit against DuPont in connection with a polybutylene plumbing system, (ii) are members of a class certified against DuPont in any polybutylene plumbing system class action lawsuit, (iii) are individual claimants represented by the Houston, Texas law firm of Fleming, Hovenkamp & Grayson, P.C.; or (iv) members of the certified class in San Diego County, California;

d. All persons who have previously executed a release in favor of DuPont regarding polybutylene plumbing systems;

e. All persons who had replumbs done before May 12, 1995, unless the homeowners was not fully reimbursed for the cost of such replumb;

f. All governmental entities, municipalities, commercial systems, and persons having yard line systems only; and

g. Any and all claims for personal injury or wrongful death.

9. Upon execution of this Order and by Order of this Court, plaintiffs and each other member of the Settlement Class, on behalf of themselves and their respective parents, subsidiaries, affiliates, related entities, successors and/or assigns, and their past, present, and future agents, representatives, servants, partners, executors, administrators, assigns, predecessors, successors, descendants, dependents, and heirs, shall be deemed to have fully released and forever discharged

DuPont, its parents, subsidiaries, affiliates, retailers, dealers, distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, present and former directors, officers, consultants, agents, stockholders and employees (who individually and collectively shall be referred to as the "Released Parties"), from any and all claims, demands, actions, causes of action, costs losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof, arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems; and, more particularly, but without in any way limiting the generality of the foregoing, the plaintiff and each member of the Settlement Class will be deemed to have released, remised, and forever discharged the Released Parties of and from any and all claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, and any and all claims related to any claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, in the above-captioned action (collectively the "Released Claims").

10. Upon execution of this Order and by Order of this Court, DuPont, its parents, subsidiaries, affiliates, retailers, dealers, and distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, past and present and former directors, officers, consultants, agents, stockholders and employees (the Released Parties) are forever discharged from any and all claims, demands, actions, causes of action, costs, losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof,

arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems.

11. Actual Class Members or those who thought they may be class members who have validly and timely requested exclusion may pursue their own individual remedies, if any.

12. The plaintiffs and all other members of the Settlement Class are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action.

13. All parties and non-parties are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems that are or could have been the subject of the above-captioned Action.

14. No further notice of the DuPont Settlement or the approval thereof is required.

15. The Court reserves jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members, (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing.

IT IS SO ORDERED, this 17th day of November, 1995.

/s/ Eddie Hardaway
EDDIE HARDAWAY
CIRCUIT JUDGE EDDIE HARDAWAY

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

No. 03-1431

IN THE

Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, INC., *et al.*,

Petitioners,

v.

SHELL OIL COMPANY d/b/a
SHELL CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION FOR RESPONDENT HOECHST CELANESE CORPORATION

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QUESTION PRESENTED

Did the South Carolina Supreme Court hold correctly that a final Tennessee state court judgment approving a nationwide class action settlement was entitled to full faith and credit under Article IV of the United States Constitution where (i) that judgment was final and entitled to *res judicata* effect in Tennessee; and (ii) all relevant matters set forth in that judgment, including jurisdiction, adequacy of notice, adequacy of representation and the fairness and reasonableness of the settlement, were fully litigated in and finally decided by the Tennessee court.

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, ("Celanese"), is an indirect, wholly-owned subsidiary of Celanese AG. Celanese AG is a publicly traded company.

EXPLANATION OF RECORD CITES

"Petition" refers to the Petition for Writ of Certiorari.

"Petition App. __" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Celanese App. __" refers to the Appendix attached to Respondent Hoechst Celanese Corporation's Brief In Opposition.

"R. __" refers to the Record on Appeal filed with the Supreme Court of South Carolina.

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COUNTERSTATEMENT OF THE CASE

By this case, Petitioners seek to contravene established full faith and credit law, claiming that they may collaterally attack and relitigate the merits of a final judgment approving a nationwide polybutylene (*i.e.*, plastic) plumbing class action settlement agreed to by Celanese, Respondent Shell Oil Company ("Shell") and the plaintiff class in *Cox v. Shell Oil Co.*, C.A. No. 18,844 (Chancery Ct. Obion Cty., Tenn.) ("*Cox*").[1] The lower courts in South Carolina held that well-settled authority and the Full Faith and Credit Clause of the United States Constitution prohibited this collateral attack on the *Cox* final order and judgment. Petitioners offer nothing to justify this Court's review of the South Carolina courts' rulings.

The $950 million settlement approved by the *Cox* court (the "*Cox* Settlement" or "Settlement") — one of the largest property damage settlements in history — brought to a conclusion over a decade of litigation relating to polybutylene plumbing in courts across the United States. The *Cox* Settlement has enabled hundreds of thousands of property owners to obtain complete relief (*i.e.*, replacement of leaking polybutylene plumbing, as well as reimbursement for any damages allegedly caused by such leaks, at no cost to the consumer). Petitioners are class members, but rather than avail themselves of this relief, Petitioners instead pursued this lawsuit. However, the November 17, 1995 final order and judgment approving the *Cox* Settlement (the "*Cox* Final Order and Judgment") bars property owners like Petitioners here, who have not opted out of the class, from

1. Petitioners have also challenged the final judgment approving the settlement agreed to by Respondent E.I. duPont de Nemours & Company ("DuPont") in *Spencer v. Shell Oil Co.*, C.A. No. CV-94-047 (Cir. Ct., Greene Cty., Ala.) ("*Spencer*"). Celanese was not a party to the *Spencer* settlement, and thus did not seek to have that final judgment accorded full faith and credit. Celanese does not question that *Spencer* should be entitled to full faith and credit under settled law, but that determination is not relevant to whether the South Carolina Supreme Court ruled correctly that the *Cox* final judgment was entitled to full faith and credit.

pursuing a lawsuit relating to polybutylene plumbing against Celanese or Shell.

Under established authority of this Court, the scope of review on a full faith and credit motion is whether the foreign court fully litigated and finally decided all issues relevant to the judgment. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) ("'a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment'") (citation omitted).

Following this settled law, the South Carolina Supreme Court, upholding the ruling of the Court of Common Pleas, Charleston County, South Carolina (the "Trial Court"), ruled that the *Cox* Final Order and Judgment was entitled to full faith and credit, and that Petitioners' claims were barred. *Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.*, 591 S.E.2d 611 (S.C. 2004) (Petition at 1a-27a); *Hospitality Mgmt. Assoc., Inc. v. Shell Oil Co.*, No. 95-CP-10-1948 (Ct. Common Pleas, S.C. June 14, 2002) (Petition at 28a-63a). In so holding, the South Carolina Supreme Court found that all matters contained in and central to the *Cox* Final Order and Judgment, including jurisdiction, adequacy of notice, adequacy of representation, and the fairness and reasonableness of the settlement, were fully litigated and finally decided by the *Cox* court. As such, the court ruled that further litigation was prohibited by the full faith and credit clause. Celanese respectfully urges the same result here.

As shown below, the South Carolina Supreme Court's decision does not conflict with any decision of this Court, a United States court of appeal or a state court of last resort. *See* U.S. Sup. Ct. R. 10. To the contrary, this Court, and every federal court of appeal and state appellate court to have recently addressed the issue, have held uniformly that in determining full faith and credit the permissible scope of review is whether

the relevant matters set forth in the foreign judgment were fully litigated and finally decided by the foreign court.

The few cases cited by Petitioners as alleged conflicting authority stand for the non-controversial proposition that collateral review is appropriate only where, unlike in *Cox*, a matter central to the prior judgment was not fully litigated and finally determined in the foreign court. Indeed, Petitioners' central authority, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part per curiam by an equally divided Court*, 539 U.S. 111 (2003), concerns the rights of class members after a settlement fund had been exhausted, an issue which was not litigated or decided in the original action and which is completely irrelevant to the instant case where the *Cox* Settlement continues to operate and to pay all valid claims.

As such, Petitioners offer nothing to contradict settled authority barring relitigation of the *Cox* case and Settlement, and offer nothing to justify this Court's review of the matter.

I. The *Cox* Settlement

In 1995, Celanese and Shell agreed without admitting liability to commit at least $950 million to provide new plumbing systems and property damage compensation to class members with qualifying leaks. (Celanese App. 11a, 17a-18a.) Under the terms of the Settlement, if the initial fund should ever be exhausted, either (a) Celanese and Shell will provide additional funds, or (b) those class members who have not received their claimed benefits will have the right to pursue their claims against Shell and Celanese as they did prior to the Settlement. (*Id.* at 11a-12a.) The Settlement has paid hundreds of millions of dollars on claims to date, and continues to operate and pay claims. (R. 2209; R. 2344.)

The *Cox* Settlement provides for recurring notice to the class, every three years through the year 2009, to ensure that

full benefits are delivered to the class and to permit subsequent opt out periods, which occurred in 1999, 2002 and will occur again in 2005. (*See* Celanese App. 18a.)

II. Approval Of The *Cox* Settlement

The *Cox* Final Order and Judgment was the end result of intense litigation and arms-length negotiations over a long period of time among all of the various interested parties, and included a two-week long settlement conference mediated by a California state court judge. Every aspect of the Settlement was litigated and decided by the *Cox* court, including, among other things, jurisdiction, the notice program, the adequacy of representation, and the fairness of the Settlement.

A. *Litigation In Cox Concerning Adequacy Of Representation*

On several occasions, the *Cox* court addressed and determined the adequacy of representation of the class. For example, in its order certifying the class, the court recognized that class counsel "included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation." (Celanese App. 15a; *see also id.* at 30a.) The issue was addressed again by the court during the fairness phase of the proceedings. (R. 2244.) At the same time, the court addressed the adequacy of the class representatives, and found them to be adequate. (R. 2251, 2254, 2258.) In addition, the issue was litigated at length in connection with objections to the application for attorneys' fees by class counsel. (R. 2472-75; R. 2483-85.) The *Cox* court, presented with evidence that the requested attorneys' fees in the *Cox* Settlement represented only 5% of the minimum class recovery, rejected such challenges. (Celanese App. 13a.)

Numerous challenges to the adequacy of representation were also raised through allegations of collusion among counsel and the parties. (*See, e.g.*, R. 2773; R. 2787-88.) These accusations were rejected as meritless, as the court found that

"the settlement agreement is the result of good faith, arms-length and non-collusive negotiations." (R. 2735.)

Finally, Judge Silver of the Superior Court of California, Monterey who, pursuant to joint orders of several courts before which polybutylene plumbing cases were pending, mediated an intensive settlement conference between the various parties, determined that the class had been adequately represented. (R. 2644-45; Celanese App. C; Celanese App. 15a-16a.)

B. *Litigation In Cox Concerning The Proposed Notice Program*

The *Cox* notice program, which cost over $10 million in 1995, and which includes an additional $18 million to be spent on continuing notice over the life of the settlement, was at the time the largest property damage class action settlement notice program in the history of American jurisprudence. (R. 2381-82.) The $10 million campaign provided at least three exposures of the notice to more than 89% of the U.S. population over twenty-five years of age. (R. 3215; R. 3001.) The notice program thus reached most property owners in the United States, including virtually all likely class members. (R. 3217.)

Notwithstanding its unprecedented extent, numerous objections to the notice program were lodged with the *Cox* court.[2] To address these objections, the court held multiple hearings where all interested parties were given the opportunity to be heard and where evidence both in support of and in opposition to the notice program was submitted. (Celanese App. 19a, 23a.) As the *Cox* court ultimately ruled after hearing argument and receiving this evidence, the *Cox* notice program "met and exceeded" all constitutional requirements, as it was "one of the most comprehensive class notice campaigns ever undertaken." (*Id.* at 24a, 32a; R. 2242, 2251.)

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2. *See* R. 2817; R. 2468; R. 2858; R. 2864-65; R. 2885.

C. *Litigation In Cox Concerning The Settlement's Fairness, Reasonableness And Adequacy*

On November 8-9, 1995, the *Cox* court conducted a fairness hearing on the proposed settlement which was open to all interested parties. (Celanese App. 8a; Petition at 32a.) At the hearing, numerous briefs in support of and in opposition to the *Cox* Settlement were presented, evidence was received, and extensive argument was heard over a two day period. In addition, a number of class members either appeared to voice their objections to the Settlement or sent letters supporting or objecting to the Settlement. (Celanese App. 9a.)

Further, the *Cox* court accepted into evidence the Recommendation of Judge Silver. (R. 2644-45; Celanese App. C; Celanese App. 15a-16a.) In recommending that the *Cox* Settlement receive final approval, Judge Silver noted, among other things, that: (1) the negotiations were adversarial and arms-length; (2) the settlement created "an even handed evaluation of claims and requests for treatment . . . and a fair method of resolution of disputes"; and (3) attorneys' fees were determined completely independent of all discussions on the terms of the Settlement. (*Id.* at 14a, 42a-43a, 46a.)

On November 17, 1995, the *Cox* court entered its Final Order and Judgment approving the Settlement. In so doing, the court stated that "[i]n independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those . . . that have since been withdrawn or stricken." (*Id.* at 26a.) Thus, each and every objection which was raised was considered by the *Cox* court before approving the Settlement.[3]

III. The *Cox* Final Order And Judgment Has Been Given Full Faith And Credit By Courts Nationwide

Because every issue relevant to the approval of the *Cox* Final Order and Judgment was fully litigated and decided by

3. All appeals from the *Cox* Final Order and Judgment have been dismissed. (R. 3565-66.)

the Tennessee court, that order and judgment has uniformly been granted full faith and credit by courts nationwide. *See Nobl Park, L.L.C. v. Shell Oil Co.*, No. 00-2-03776-1 (Wash. Super. Ct. Nov. 26, 2002); *Fry v. Hoechst Celanese Corp.*, No. 95-6414-CA-11 (Fla. Cir. Ct., Dade Cty. July 17, 1996) (R. 3567); *Hop v. Hoechst Celanese Corp.*, No. 95-CV-004930 (Wis. Cir. Ct., Milwaukee Cty. Mar. 28, 1996) (R. 3569; R. 3947); *Farr v. RCP Invs.*, CV 93-08807 (Ariz. Super. Ct., Maricopa Cty. Jan. 29, 1996) (R. 3571); *Fry v. Hoechst Celanese Chemical Group*, No. 95-2225-CA-B (Fla. Cir. Ct., Marion Cty. Jan. 29, 1996) (R. 3944); *Nothorn v. Shell Oil Co.*, No. 661692 (Super. Ct., San Diego Cty., Cal. Jan. 26, 1996) (R. 3578); *Spencer v. Shell Oil Co.*, CV94-047 (Ala. Cir. Ct., Greene Cty. Dec. 4, 1995) (R. 3583).

IV. Proceedings In The Trial Court

Petitioners are all members of the *Cox* settlement class who did not opt out of the Settlement. (Petition App. at 33a.) Instead of seeking relief under the Settlement, Petitioners sought damages from Respondents under various theories of liability, alleging that they own commercial and residential properties in South Carolina containing defective polybutylene plumbing. (*See id.* at 2a.) Petitioners did not sue any of the various companies that designed, manufactured, sold or installed the different types of polybutylene plumbing and components thereof. Rather, Petitioners sued only some of the raw material suppliers, such as Shell, Celanese and DuPont, that provided the resins used by other companies in the manufacture of certain components for the different types of polybutylene plumbing.[4] (*See id.*)

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4. Contrary to Petitioners' assertion (Petition at 3), Celanese did not market or manufacture polybutylene plumbing, but rather Celanese supplied a raw material, known as Celcon, which was used by certain manufacturers to fabricate insert fittings that joined pieces of pipe in some types of polybutylene plumbing, and is still used today successfully in hundreds of applications, including properly designed potable plumbing applications. (*See* Petition App. at 2a n.1.)

A. *Respondents' Motions For Summary Judgment*

On May 1, 2001, Celanese and the other Respondents moved for summary judgment on full faith and credit grounds. Specifically, Celanese argued that Petitioners' claims were fully resolved pursuant to the *Cox* Final Order and Judgment. (*See* R. 232, 4412.) In a detailed, thirty page order, the Trial Court granted Respondents' motions, ruling expressly that:

> The Supreme Court does not allow a state court to examine *de novo* or undertake such broad collateral review of another state court's judgment before according it full faith and credit. Rather, the permissible scope of review here is to examine the findings of the *Cox* and *Spencer* courts, subject to the limited collateral review allowed by the Supreme Court, and ascertain whether the Tennessee and Alabama courts extended the relevant due process to the nationwide class. The record unmistakably shows that the courts fully considered all due process issues relating to its jurisdiction over absent class members and determined that jurisdiction existed. Thus, the judgments are entitled to full faith and credit in this Court as guaranteed by the Constitution.

(Petition App. at 42a.) Petitioners appealed that order directly to the South Carolina Supreme Court.

V. The South Carolina Supreme Court's Decision

Consistent with established jurisprudence of this Court, the South Carolina Supreme Court held that the *Cox* Final Order and Judgment was entitled to full faith and credit, and affirmed the dismissal of Petitioners' claims. (Petition App. at 26a-27a.) The court rejected Petitioners' contention that the court was required to conduct a broad collateral review of the *Cox* Final Order and Judgment before ruling on full faith and credit, as such review would permit one state court to "second-guess[] the fully litigated decisions of our sister courts . . ." (*Id.* at 18a.) The court concluded that:

> [proper] procedures were not only in place in . . . *Cox*, but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the . . . *Cox* order[].

(*Id.* at 27a.)

REASONS FOR DENYING THE PETITION

I. THE SOUTH CAROLINA SUPREME COURT HELD CORRECTLY THAT THE *COX* FINAL ORDER AND JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT, AND THAT PETITIONERS' CLAIMS WERE BARRED

The United States Constitution provides that "[f]ull faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.[5] This Court has explained that full faith and credit "generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." *Durfee v. Duke*, 375 U.S. 106, 109 (1963). As this Court made clear in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), full faith and credit applies equally to judgments entered in class actions as to those entered in individual lawsuits: "[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit. . . ." *Id.* at 374.

A. *The South Carolina Supreme Court Held Correctly That The Scope Of Review On A Full Faith And Credit Motion Is Limited Expressly To Whether The Foreign Court Litigated And Decided All Issues Relevant To The Foreign Judgment*

Petitioners argue that the South Carolina Supreme Court should have permitted broad collateral review of the *Cox* Final

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5. The requirement that federal courts give full faith and credit to state court judgments is codified at 28 U.S.C. Section 1738.

Order and Judgment prior to ruling on full faith and credit. According to Petitioners, unless absent class members are entitled to litigate *de novo* any objections which they may have to a class action settlement, absent class members would have no "meaningful avenue" to protect their due process rights.[6] (Petition at 2-3, 9.) In making this argument, Petitioners ignore the law and the very purpose of the Full Faith and Credit Clause.

This Court does not allow a court to examine *de novo* or undertake broad collateral review of a foreign judgment before determining whether it is entitled to full faith and credit. Rather, the scope of review permissible with respect to any issue relevant to a judgment or order of a sister state is limited: "'a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.'"[7]

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6. Petitioners claim that because they did not personally appear in *Cox*, they are entitled to attack collaterally the *Cox* court's findings. (Petition at 13.) In so arguing, Petitioners ignore the representational nature of a class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (explaining that "a 'class' or 'representative' suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense") (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)).

7. Petitioners argue that the jurisdictional findings in the *Cox* Final Order and Judgment are "self-serving jurisdictional recitals," and thus not entitled to full faith and credit. (Petition at 13-14.) Petitioners are wrong. First, jurisdiction was litigated and decided in *Cox*. Thus, the findings of jurisdiction by the *Cox* court are not mere recitals. Second, the cases Petitioners cite for their proposition make clear that where, as here, the prior court litigated and decided jurisdiction, it may not be relitigated (even if, unlike here, the jurisdictional ruling was erroneous). *See Williams v. North Carolina*, 325 U.S. 226, 230 n.6 (1945) ("We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding"); *Peoples Nat'l Bank v. Manos Bros., Inc.*, 84 S.E.2d 857, 866 (1954) (noting expressly that the prior court's decree "contained no recital or express finding" concerning jurisdiction).

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982) (quoting *Durfee*, 375 U.S. at 111). *Accord Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (". . . the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based . . . Whatever mistakes of law may underlie the judgment") (citation omitted); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined").

That the foreign judgment concerns a class action settlement does not alter this settled rule. Indeed, in *Matsushita*, this Court reversed a decision of the Ninth Circuit Court of Appeals that denied full faith and credit to a class action settlement approved by a Delaware state court. In holding that the Delaware judgment was entitled to full faith and credit, the Court found that the procedural due process requirements set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) — adequate notice, an opportunity to be heard and participate, the right to opt out, and adequate representation — had been litigated in and decided by the Delaware court:

> [T]he Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable and adequate and in the best interests of the . . . Settlement class" and that notice to the class was "in full compliance with . . . the requirements of due process." . . . The Court of Chancery "further determined that the plaintiffs, . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class."

516 U.S. at 378-79 (citations omitted). Having determined that the Delaware court had considered and addressed each of the

relevant due process elements necessary to bind absent class members, the Court reviewed the issue no further. *Id.* at 379.

Moreover, if Petitioners' theory was the law, class action judgments would never be truly final, as they would always be subject to collateral attack in multiple fora by any dissatisfied class member who had not actually appeared in the initial case. *See Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (explaining that the "clear purpose" of full faith and credit is "to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered").

Following this settled authority, the South Carolina Supreme Court held that the proper scope of review here is "limited" to whether the due process issues were fully litigated and decided by the foreign court. The court explained that broad collateral review "would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court." (Petition App. at 18a.) Applying this appropriate scope of review to the *Cox* Final Order and Judgment, the South Carolina Supreme Court concluded that the *Cox* court had adopted and utilized appropriate procedures to safeguard the due process rights of the absent class members. Having reached this conclusion, the court reviewed the matter no further, ruling that:

> the proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one limited to a consideration of whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues.

(*Id.* at 26a-27a.) As such, the South Carolina Supreme Court's decision is fully consistent with prior holdings of this Court.

B. *The South Carolina Supreme Court Ruled Correctly That The Cox Court Had Adopted And Utilized Appropriate Procedures To Protect The Rights Of The Absent Class Members*

The South Carolina Supreme Court properly concluded that the *Cox* court had adopted and utilized appropriate procedures to safeguard the absent class members' due process rights, as the court found that all issues central to the *Cox* Final Order and Judgment were fully litigated and finally decided by the Tennessee court. As shown below, Petitioners' assertions are simply collateral attacks aimed at relitigating the *Cox* case and Settlement.

1. All Issues Concerning Subject Matter And Personal Jurisdiction Were Litigated And Decided By The *Cox* Court

Despite Petitioners' conclusory, single sentence assertion that personal jurisdiction was not litigated in *Cox* (Petition at 15), the Trial Court reviewed the massive record of the *Cox* proceeding, and found that the *Cox* court "fully considered all due process issues relating to its exercise of jurisdiction over absent class members and determined that jurisdiction existed." (Petition App. at 47a.) Indeed, the *Cox* court heard argument concerning personal jurisdiction, and in its Final Order ruled that: "[t]he Court has jurisdiction over all claims asserted in the Action on behalf of all . . . members of the Settlement Class." (Celanese App. 33a.) Therefore, this issue is not subject to collateral review.

Petitioners have not even attempted to challenge the Trial Court's finding, affirmed by the South Carolina Supreme Court, that the "issue of subject matter jurisdiction was fully contested, briefed, and argued before being finally decided by the *Cox* . . . court[]." (Petition App. at 46a.) This is not surprising, as the uncontradicted record below demonstrates that the *Cox* court issued a reasoned and thorough order rejecting a subject matter jurisdiction challenge. (R. 2465; R. 2385; *see also* Celanese App. 33a.) Therefore, this issue was fully litigated and finally decided, and is not subject to collateral review.

2. The South Carolina Supreme Court Properly Found That The Adequacy Of The Notice Program Was Litigated And Decided By The *Cox* Court

The record below demonstrated conclusively that the extensive *Cox* notice program was the subject of numerous and detailed briefs, including objections, several adversarial hearings, and several court orders. (Petition App. at 48a.) After considering each of the objections, the *Cox* court found that the notice program provided the best practicable notice under the circumstances, and that it "met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*] and its progeny." (Celanese App. 24a.) Based on this record, the South Carolina Supreme Court found that "the *Cox* court [had] designed and utilized various procedural safeguards to guarantee sufficient notice" to the absent class members, and that well-established principles of full faith and credit prohibited further review. (Petition App. at 22a.)

Petitioners seek to relitigate the issue, contending that the *Cox* notice program was inadequate. However, as shown below, the arguments which Petitioners raise here were rejected by both the South Carolina Supreme Court and the Trial Court because, among other things, the *Cox* court had addressed and decided each of these contentions, and thus relitigation was barred.

First, Petitioners claim erroneously that the content of the *Cox* notice was inadequate because it allegedly did not contain information concerning the assignment of rights to defendants and the exact amount of attorneys' fees.[8] (Petition at 20-21.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that these issues were fully litigated and finally decided by the *Cox* court. (Petition App. at 55a.) The record

8. Contrary to the Petition, the *Cox* Settlement provides more generous relief than that offered on a voluntary basis through the Plumbing Claims Group ("PCG"), as the PCG generally does not pay for damages, just a replumb.

below demonstrates that the *Cox* court rejected objections to notice similar to those Petitioners raise here, and determined that the "notice accurately and adequately advised [class members] of this action; the proposed Settlement and its terms, features and benefits; their rights and options; and the applicable procedures and deadlines for exercising them." (R. 2251.) Moreover, the record — which Petitioners ignore — demonstrates that the *Cox* notice complied fully with the requirements of procedural due process, as the notice informed potential class members of (1) the existence of the action, including a description of the pending litigation, polybutylene plumbing and the criteria for inclusion in the settlement class; (2) the requirements for opting out; (3) the requirements for entering an appearance before the court; and (4) the applicability of a final judgment to all members who do not opt out of the class. (*See* R. 3960-61; Petition App. at 20a-21a; Celanese App. 24a.) Thus, relitigation of this issue is not permitted under the Full Faith and Credit Clause.

Second, Petitioners claim erroneously that the *Cox* notice program was inadequate because they did not actually receive notice of the *Cox* Settlement. (Petition at 17-20.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that this very issue had been fully litigated and decided by the *Cox* court. (Petition App. at 52a-53a; *see, e.g.*, R. 3684; R. 2858.) As the Trial Court concluded:

> The record clearly reveals that the *Cox* and *Spencer* courts carefully considered the issue of how to best provide notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court. . . .

(Petition App. 22a.) Indeed, in determining that the *Cox* notice campaign met and exceeded all due process requirements, the *Cox* court found that: "Since not all Settlement Class Members were known or readily identifiable, the notice program

implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service." (Celanese App. 19a-20a.) Thus, further litigation of this issue is barred by the Full Faith and Credit Clause.

Moreover, even if Petitioners were permitted to relitigate the issue, they have misstated the law. As the South Carolina Supreme Court recognized, this Court does not require that every class member receive personal notice. Rather, notice must be "the best practicable, 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Petition App. at 21a) (quoting *Shutts*, 472 U.S. at 812.) As shown above, the extensive multi-media notice program used in *Cox* clearly met this standard, as it was one of the most comprehensive class notice campaigns ever undertaken. The notice experts who designed and implemented the notice program testified in the *Cox* court that notice would reach nearly every class member a number of times. Based on this evidence, which Petitioners do not contest, the *Cox* court approved the notice as exceeding the constitutional requirement for adequate notice. (Celanese App. 19a-24a.) *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950) (in affirming notice by publication, the Court held that "impracticable and extended searches are not required in the name of due process").

3. The South Carolina Supreme Court Properly Found That The Adequacy Of Representation Was Litigated And Decided By The *Cox* Court

The record below demonstrated clearly that all objections concerning the adequacy of both *Cox* class counsel and the *Cox* class representatives were fully considered and finally decided by the *Cox* court. Indeed, in its Final Order, the *Cox* court rejected objections similar to those Petitioners raise here and found that "[t]he *Cox* Class Counsel maintained the highest standards of

professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." (Celanese App. 30a.) Likewise, the *Cox* court considered and determined that the class representatives were adequate. (R. 2258; Celanese App. 24a.) Consistent with its limited scope of review, the South Carolina Supreme Court concluded that "there obviously were procedures in place to ensure adequate representation in . . . *Cox*, and that such procedures were implemented throughout." (Petition App. at 26a.)

Nonetheless, Petitioners seek to relitigate adequacy of representation here. Once again, both the South Carolina Supreme Court and the Trial Court rejected nearly identical arguments to those raised by Petitioners here because, among other things, the *Cox* court had addressed and decided each of these contentions, and thus relitigation was barred.

First, Petitioners claim erroneously that the attorneys' fees awarded to *Cox* class counsel created a conflict of interest between class counsel and the class. (*Id.* at 24-25.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that this very issue was fully litigated and finally decided by both the *Cox* court and Judge Silver.[9] (Petition App. at 26a, 57a-59a.) As the *Cox* court found: "There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Celanese App. 30a.) To the contrary, the *Cox* court determined that attorneys' fees represented only 5% of the minimum class recovery — an amount substantially less than the percentage of counsel fees awarded in similar cases. (*Id.* at 13a.) Moreover, the *Cox* court found that fees paid to class counsel were separate and apart

9. Petitioners claim erroneously that "*Spencer* counsel" were paid "to drop their objections" to the *Cox* Settlement. (Petition at 5, 24-25.) This objection was considered and rejected by both the *Cox* court and Judge Silver before any fees were awarded. (*See* Petition App. at 60a-61a; Celanese App. 30a, 35a, 45a-46a.) Thus, this very issue was fully litigated and finally decided.

from the settlement, and thus did not affect the amount of money available to class members under the settlement. (*Id.*) Thus, relitigation of this issue is barred by the Full Faith and Credit Clause.[10]

Second, Petitioners make a number of conclusory and erroneous assertions regarding *Cox* class counsel's conduct. (Petition at 26-27.) However, the Trial Court found, and the South Carolina Supreme Court affirmed, that the *Cox* court heard and rejected essentially identical objections concerning the conduct of class counsel. (Petition App. at 26a, 57a; Celanese App. 44a-46a.) As the South Carolina Supreme Court noted: "The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class." (Petition at 26a.) Thus, this issue was fully litigated and finally decided by the *Cox* court, and is not subject to collateral review.

Third, Petitioners claim that the *Cox* class representatives did not adequately represent the interests of the entire class because under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), subclasses should have been created to represent the interests of future claimants.[11] (Petition at 23, 27-28.) However,

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10. Contrary to the Petition, the *Cox* Settlement approval was not conditioned on "the separate settlement of Plaintiff's counsels' private inventory of claims." (Petition at 24.) Indeed, in *Cox*, the judge who oversaw the final two week negotiating session rejected this exact objection: "There was absolutely NO "private inventory sale" conditioned on class settlement. . . . [M]onitoring this issue was one of my responsibilities." (Celanese App. 44a-45a.) Likewise, the *Cox* court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement." (*Id.* at 30a.)

11. Even if (contrary to law and fact) the *Cox* Final Order and Judgment were deemed erroneous under *Amchem*, it would still be entitled to full faith and credit. *See Underwriters*, 455 U.S. at 709 n.16 (Cont'd)

the Trial Court found, and the South Carolina Supreme Court affirmed, that the *Cox* court fully considered and determined that the class representatives were more than adequate, and that no subclasses were necessary. (Petition App. at 61a-63a.) Significantly, as the evidence before the Trial Court demonstrated, the class representatives' ability to adequately represent future claimants was the subject of intensive litigation in the *Cox* court. (*See, e.g.*, Petition App. at 26a; R. 2257-58; R. 3222; R. 3516-17; R. 3463; R. 2385; R. 3018-19; R. 3291.) Moreover, it would appear that Petitioners lack standing to raise this argument, as Petitioners each claim to have suffered an injury.[12] (*See* Petition App. at 2a.)

Further, assuming *arguendo* (and contrary to controlling law) that Petitioners were entitled to relitigate the adequacy of the named plaintiffs in *Cox*, Petitioners' claim is meritless. First, *Amchem* was decided more than 18 months after *Cox*, and cannot be applied retroactively to reopen the *Cox* Final Order and Judgment.[13] Second, nothing in *Amchem* even suggests that the *Cox* Settlement has constitutional defects. *Amchem* concerned a direct appeal from a judgment approving a nationwide class action settlement that sought to resolve all claims arising from alleged exposure to the defendants' asbestos-containing

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(Cont'd)

("an error of law . . . does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue").

12. *See Shutts*, 472 U.S. at 804 ("One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties").

13. *Compare Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (holdings of the Supreme Court are controlling and must be given "full retroactive effect in all cases *still open on direct review*") (emphasis added), *with James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541-42 (1991) ("Of course, retroactivity in civil cases must be limited by the need for finality . . . Public policy dictates that there be an end of litigation . . . that matters once tried shall be considered forever settled as between the parties") (citations omitted).

products, regardless of whether the class members had contracted an asbestos-related disease. In reviewing the proposed settlement, this Court discussed potential problems with the proposed settlement, including, among other things, that it: (1) provided compensation in a fixed range without any adjustment for future inflation; (2) capped the number of claims eligible for payment in a given year; and (3) limited the number of opt outs in future years. 521 U.S. at 626-28. The Court was also concerned that future claimants would be denied their right to opt out of the settlement because notice had been disseminated before they had incurred any injury. *Id.* at 628. The *Cox* Settlement has none of these problems.

As the Trial Court found and the South Carolina Supreme Court affirmed, the issues presented in *Amchem* are irrelevant to the *Cox* Settlement, as (i) the relief under the settlement is provided regardless of inflation; (ii) there is no cap on the number of claims eligible for payment in any year; (iii) there are subsequent notice and opt out periods for future claimants, and no limitation on the number of opt outs; and (iv) if future eligible claimants are not afforded the relief provided by the *Cox* Settlement because the fund is exhausted, those claimants retain and may pursue their claims against Celanese and Shell with any applicable limitations periods tolled.[14] (Petition App. at 62a-63a; *see also* R. 2280-2300.) Thus,

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14. Contrary to Petitioners' contention (Petition at 25-26), there is no conflict of interest between commercial property owners and single unit property owners because all eligible claimants are similarly situated and receive identical relief: a replacement of leaking polybutylene plumbing in any eligible unit, as well as reimbursement for any damages allegedly caused by such leaks. (*See* Celanese App. 17a.) Moreover, the issue of whether non-leaking properties or units should receive relief was extensively litigated in *Cox*, and the *Cox* court determined that limiting relief to properties or units which are leaking was proper. (*Id.* at 11a.) Thus, relitigation of this issue by Petitioners is prohibited.

contrary to Petitioners' claim (Petition App. at 2, 8), the South Carolina Supreme Court's decision does not conflict with this Court's holding in *Amchem*.[15]

4. The Fairness Of The *Cox* Settlement Was Litigated And Decided

The record below shows that the fairness and reasonableness of the *Cox* Settlement was fully litigated and finally decided by the *Cox* court. For example, in concluding that the *Cox* Settlement is "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class" (Celanese App. 11a-13a, 25a), the *Cox* court made 73 separate findings of fact and conclusions of law that discussed at length the various aspects of the Settlement. (Celanese App. B.) Before ruling on the issue, the court received extensive briefing on all of these issues, including numerous objections, held numerous adversarial hearings and received significant evidence. All objections, even those which were untimely or subsequently dropped or waived, were considered by the *Cox* court before it rendered its decision. (Celanese App. 26a.) Thus, every issue, regarding every aspect of the fairness or adequacy of the *Cox* Settlement, was litigated and decided by the *Cox* court, and relitigation is barred.

Rather than challenging this record, Petitioners have attempted, as they did below, to collaterally attack the relief provided under the *Cox* Settlement, claiming that the Settlement provides less than $150 per unit.[16] (Petition at 26.) Petitioners

15. Petitioners' citation to *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (Petition at 27), is equally unavailing. There, unlike in *Cox*, the parties sought to certify a *mandatory* settlement class on a limited fund theory under Fed. R. Civ. P. 23(b)(1)(B). In *Ortiz*, the Court rejected the settlement because it failed to "'ensur[e] an ample, inflation-protected fund for the future'" *id.* at 856 (citation omitted), which the *Cox* Settlement does through, among other things, subsequent notices and opt-out periods and retention of claims in the event of exhaustion of the funds.

16. Petitioners erroneously claim that the few polybutylene plumbing-related cases which went to trial against Respondents resulted (Cont'd)

are wrong. The relief provided to class members is a replacement of leaking polybutylene plumbing in any eligible unit, as well as reimbursement for any damages caused by the leaks, regardless of the cost. (Celanese App. 17a.) As a result, the *Cox* Settlement offers complete relief to class members, and is many times higher than the per unit figure claimed by Petitioners here.

II. THE SOUTH CAROLINA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY UNITED STATES COURT OF APPEAL, OR ANY OTHER STATE COURT OF LAST RESORT ON THE SAME MATTER

Notwithstanding Petitioners' arguments (Petition at 1-2, 9), the South Carolina Supreme Court's decision does not conflict with any decision of this Court, any court of appeal, or any other state court of last resort on the same matter.

A. *The South Carolina Supreme Court's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal Or State Court Of Last Resort To Address The Same Matter In the Context Of A Class Action*

The courts of appeal and state courts of last resort which have recently addressed the issue in the class action context have held uniformly that in determining full faith and credit the permissible scope of review is limited to whether all relevant matters set forth in the foreign judgment were fully litigated and finally decided by the foreign court.

(Cont'd)
in large payouts to plaintiffs. (Petition at 26.) However, Petitioners ignore that most of those cases were either reversed, in whole or in part, on appeal, or were settled for amounts comparable to *Cox* relief and for far less than the verdicts. *See Gawara v. United States Brass Corp.*, 74 Cal. Rptr.2d 663 (Cal. Ct. App. 1998); *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *United States Brass Corp. v. Andraus*, 1993 WL 313208 (Tex. App. 1993).

1. The United States Court Of Appeals For The Ninth Circuit

This very issue was addressed by the Ninth Circuit in *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999) where the court held that:

> Limited collateral review would be appropriate, therefore, to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a "full and fair opportunity" to litigate the claim or issue. This review would not, however, include reconsideration of the merits of the claim or issue.

Id. at 648-49 (citation omitted).

The factual scenario in *Epstein* is strikingly similar to the one at issue here, and even Petitioners' counsel concedes that the facts are "almost on all fours" with this case. Specifically, that action, like this action, concerned the determination of whether a class action settlement approved by a state court was entitled to full faith and credit. There, like here, the plaintiffs argued that *Shutts* created a "largely unfettered right to challenge collaterally the adequacy of representation in class actions." *Id.* at 647. In soundly rejecting this argument, the Ninth Circuit held, like here, that:

> *Shutts* does not support the broad collateral review that the Epstein appellants seek. . . . Simply put, the absent class members' due process right[s] [are] protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court. . . . Due process requires that an absent class member's right[s] be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.

Id. at 648 (citations omitted). Thus, the Ninth Circuit held that a court reviewing a class action settlement approved by a foreign court may only determine whether the matters central to the judgment, including the *Shutts* due process factors, were litigated and decided by the foreign court.

2. The United States Court Of Appeals For The Second Circuit

Contrary to Petitioners' assertion (Petition at 16), the South Carolina Supreme Court's decision does not conflict with the Second Circuit's holding in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part per curiam by an equally divided Court*, 539 U.S. 111 (2003).

There, unlike here, an absent class member whose injury arose after the depletion of the settlement fund sought to collaterally attack the prior court's determination that the class had been adequately represented. *Id.* at 257-58. In permitting the plaintiff to collaterally challenge the adequacy of representation finding, the Second Circuit explained that "neither this Court nor the district court has addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the settlements funds."[18] *Id.* Thus, consistent with decisions of this Court, the Second Circuit held only that collateral review was appropriate where, unlike in *Cox*, a matter central to the prior judgment was not fully litigated and finally determined in the prior proceeding.[17] Indeed, the Second Circuit noted that this outcome was entirely consistent with *Epstein* without adopting the Ninth Circuit's holding. *Id.* at 258 n.6.

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17. Petitioners' claim notwithstanding (Petition at 9, 16), the South Carolina Supreme Court's decision does not conflict with *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003). To the contrary, the Vermont Supreme Court ruled that collateral review is appropriate where, unlike in *Cox*, a matter central to the prior judgment had not been fully litigated and decided. *Id.* at 1017-20 ("We do not accept that the Alabama court litigated the issues on which jurisdiction over the class members depended. Indeed, the essential deficiency in the fairness proceeding is that the court did not litigate them").

Moreover, *Stephenson* is inapposite. Unlike in *Stephenson*, Petitioners here do not claim that they could not obtain relief under the *Cox* Settlement. To the contrary, Petitioners here admit that they could have obtained relief under the *Cox* Settlement, but were simply dissatisfied with the relief offered. (*See* Petition App. at 77a.) Further, the problem faced by the Second Circuit in *Stephenson* does not exist here because the *Cox* Settlement fund has not been exhausted. In any event, if future eligible claimants are not afforded the relief provided by the *Cox* Settlement because the fund is exhausted, those claimants retain their rights against Celanese and Shell, and may pursue their claims with any applicable statutes of limitations or repose tolled. (Celanese App. 17a.)

3. The United States Courts Of Appeals For The First And Third Circuits

Both the First and Third Circuits have found that class action settlements approved by state courts are entitled to full faith and credit when the relevant matters have been fully litigated and finally decided by the state courts. For example, in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), the First Circuit held that the Full Faith and Credit Act barred the plaintiffs from collaterally attacking a class action settlement approved by the Delaware Chancery Court because "[t]he Delaware courts, affording all the prophylaxis which the Due Process Clause commands, adjudicated the question of whether appellants had a right, or should have been allowed, to opt out of the settlement." *Id.* at 33. The court ruled further that if the plaintiffs "were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief." *Id. See also Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (finding that a class action settlement approved by a Minnesota state court was entitled to full faith and credit because the Minnesota "court determined that the class had been adequately represented and that the settlement was fair . . .").

Likewise, in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), the Third Circuit ruled that a class action settlement approved by a Delaware state court was entitled to full faith and credit. There, like here, the plaintiffs collaterally challenged the settlement, seeking to relitigate, among other things, the adequacy of representation and fairness of the settlement. However, the Third Circuit found that those issues had been "conclusively determined in the Delaware proceeding," and thus relitigation was prohibited. *Id.* at 1562-63.

4. The Ohio Court Of Appeals

The Ohio Court of Appeals' decision in *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App. 2000), *cert. denied*, 532 U.S. 942 (2001) is the only state court of appeal decision Celanese located that addressed this issue in the context of a class action judgment. There, like here, absent class members sought to collaterally attack a class action settlement approved by an Illinois state court, arguing that they were entitled to litigate *de novo* the Illinois court's findings of adequacy of notice and representation. *Id.* at 420. However, the court found that "[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but rather by the application of appropriate procedures in the certifying court and by the courts that review its determinations." *Id.* (citations omitted). Accordingly, the court ruled that:

> [T]he appropriate collateral review involves an examination of *procedural* due process and nothing more. As long as procedural safeguards are established by the law and employed, absent class members' objections to the determinations of the certifying court may be properly remedied on appeal within the forum state's judicial system and to the United States Supreme Court.

Id. at 421 (emphasis in original). As the court explained in granting full faith and credit, "[t]o hold otherwise would create a form of collateral review that is inconsistent with both the

spirit of the class-action mechanism and the principles at the very core of the full faith and credit doctrine." *Id.*

B. *The South Carolina Supreme Court's Decision Does Not Conflict With Any Other Decision Of Any Court Of Appeal Or State Appellate Court Outside The Class Action Context*

The South Carolina Supreme Court's decision does not conflict with any decision of any court of appeal or state court of last resort on the same matter outside the context of a class action:

1. The United States Court Of Appeals For The Fifth Circuit

The Fifth Circuit has held unequivocally that "a wide-ranging de novo examination of jurisdictional questions may be inconsistent with full faith and credit principles. The scope of review that one court may conduct to determine a foreign court's jurisdiction to render a challenged judgment is limited." *A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1460 n.17 (5th Cir. 1986). Consistent with this Court's holdings, the Fifth Circuit has ruled that this limited scope of review consists only of whether the relevant matters set forth in the foreign judgment were fully litigated and finally decided. *Id. See also Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) ("Because the jurisdictional issue was fully litigated in the original court, this issue may not be relitigated by way of collateral attack").

2. The United States Courts Of Appeals For The Tenth And Eleventh Circuits

While the Tenth and Eleventh Circuits have not stated the proper scope of review in determining full faith and credit, both circuits have confirmed the settled rule that a foreign judgment is entitled to full faith and credit where the relevant matters were litigated and decided in the foreign court. *See, e.g., Read v. Dunn*, 2000 U.S. App. LEXIS 16482, *7 (10th Cir. July 14, 2000) (ruling that "unless the defect appears on the face of the

record," a reviewing court must give full faith and credit to a foreign court's judgment); *Harbuck v. Marsh Block & Co.*, 896 F.2d 1327, 1329-30 (11th Cir. 1990) (in rejecting the plaintiff's request to "revisit" the foreign court's finding of jurisdiction, the court held that "[w]here the question of personal jurisdiction has been fully and fairly litigated and finally decided in the state court . . . that decision must be accorded full faith and credit in the federal court").

3. State Courts Of Last Resort

From Celanese's review, it appears that every state court of last resort to have recently addressed the issue outside the context of a class action has confirmed the settled rule that a foreign judgment is entitled to full faith and credit where the relevant matters were litigated and decided in the foreign court. For example, in *Northern Ind. Commuter Transp. Dist. v. Chicago Southshore & S. Bend R.R.*, 685 N.E.2d 680 (Ind. 1997), the Supreme Court of Indiana held that the "scope of review" on a motion to accord full faith and credit to a foreign court judgment is "'limited'" to whether the relevant matters were "'fully considered' and 'finally determined' in the first state . . . ." *Id.* at 686 (citation omitted). As such, the court rejected a challenge to the foreign court's jurisdiction because the issue had been "fully briefed and argued and conclusively decided" in the foreign court, and thus a reviewing court was "not free to second guess" the foreign court's decision. *Id.* at 687-88. *See also Smith v. Mason*, 964 P.2d 743, 746 (Mont. 1998) ("the doctrine of res judicata precludes a second court from considering jurisdiction so long as the first court fully and fairly considered the issue. . . ."); *Hamilton v. Patterson*, 115 S.E.2d 68, 70 (S.C. 1960) ("full faith and credit . . . precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based") (citation omitted); *Mayhew v. Caprito*, 794 S.W.2d 1, 2 (Tex. 1990) (same).

CONCLUSION

Under established law, the Full Faith and Credit Clause permits a reviewing court to conduct only a limited collateral review to determine if the matters central to the foreign judgment were fully litigated and finally decided in the foreign court. As the South Carolina Supreme Court explained, "[w]ithout limited review, a nationwide class action could be vulnerable to collateral actions in the 49 other states in which it was not litigated initially." (Petition App. at 17a.) The record below demonstrates conclusively that all relevant matters set forth in the *Cox* Final Order and Judgment, including jurisdiction, adequacy of notice, adequacy of representation and the fairness and reasonableness of the settlement, were fully litigated and finally decided after several adversarial proceedings and on a voluminous record by the Tennessee court. Therefore, the South Carolina Supreme Court held correctly that the *Cox* Final Order and Judgment is entitled to full faith and credit, and that Petitioners' claims were properly dismissed. The South Carolina Supreme Court's decision is fully consistent with the established authority of this Court and the other federal and state appellate courts to have addressed similar issues, and thus further review of this matter is not warranted. For these reasons, Celanese respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — FINAL JUDGMENT OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE DATED AND FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

FINAL JUDGMENT

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment

dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is **ORDERED** that judgment is hereby entered in accordance with the Final Order.

Appendix A

It is further **ORDERED** that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245,

654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further **ORDERED** that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further **ORDERED** that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further **ORDERED** that, in the event that the settlement does not become final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further **ORDERED** that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further **ORDERED** that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further **ORDERED** that, in accordance with the above-described Application and the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further **ORDERED** that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further **ORDERED**, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby

DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

s/ W. Michael Maloan
W. MICHAEL MALOAN, CHANCELLOR

APPENDIX B — FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE, UNION CITY, TENNESSEE FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR
OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

OBION COUNTY

Paula Rice
Clerk and Master
D.C. & M.

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

Appendix B

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement (the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response

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1. The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

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OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely.

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2. *Spencer, et al v. Shell Oil, et al,* Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

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The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable.The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the Court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which

provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate

state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less: approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility

procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation, intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action,

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Robert Beeman, et al. v. Shell Oil Company, et al., No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions

around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

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3. *Meers, et al vs. Shell Oil, et al,* Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

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11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notices as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

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15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in

this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend, People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of

these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bimonthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared 18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the

public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

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30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11 % of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88 % of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation,* 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation,* MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.,* 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

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37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed Settlement* required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in

accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

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45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased

from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was) only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

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56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak"—a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater-does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

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68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner,* 212 Tenn. 400, 410, 370 S. W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers,* 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.,* 480 U.S. 934 (1987); *Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir. *1990); In re Warner Communications Sec. Litig.,* 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd,* 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4, *et seq.,* since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public

interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the clash of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby **ORDERED, ADJUDGED, and DECREED:**

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1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
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> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties

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to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the

Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement,

the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

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16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

s/ W. Michael Maloan
CHANCELLOR

ENTERED: November 17, 1995

APPENDIX C — MINUTE ORDER: RECOMMENDATION RE: SPENCER/COX SETTLEMENT DATED NOVEMBER 8, 1995

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

Date: November 8, 1995

Hon. Richard M. Silver

No. M 30590

HELEN MEERS et al

Plaintiffs,

vs

SHELL OIL COMPANY, et al,

Defendants.

Minute Order:
RECOMMENDATION RE: SPENCER/COX SETTLEMENT

RMS/bh

Pursuant to the joint order of SPENCER, COX, and MEERS this court conducted a mandatory settlement conference commencing October 23, 1996 and continuing through November 7, 1996. At the beginning of the sessions the court explained its role and the competing interests. It is important to reiterate several of those points in this minute order.

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This litigation has been ongoing for almost 10 years. Two national class actions are new pending with the plaintiff consumers represented by different counsel. A substantial number of individual cases are pending in Texas. Settlements representing small groups of consumer plaintiffs had been reached in the past. Two settlements in San Diego County have been recently consummated. If global agreement was not reached, this litigation could continue for another 10 years. The competing parties each had substantial disagreements with settlements that had been reached in the two national class actions. It was the stated purpose of these settlement discussions to achieve global resolution of the two national class actions and the individual cases in Texas. If a fair and appropriate global settlement could be reached, I indicated I would recommend its approval to each of the courts presiding over the national class actions and also recommended that the courts presiding over the numerous state class actions accord the settlement full faith and credit.

In addition to the above I also defined my role. It was important that everyone understood that settlement, simply for the purpose of settlement, was not appropriate. Before I would agree to recommend the settlement, it would have to meet a class fairness standard, I felt this to be essential to insure that the resolution of the differences did not turn on attorney fees and, just as significantly, to insure that there was a reasonable relationship between the class settlement and the settlement of the individual cases pending in Texas. Obviously these are also matters to be considered by the judges in the required fairness hearings. I reiterate these points to assure all courts that these concerns were not overlooked and, in fact, guided all my settlement discussions and my recommendations.

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I perceived several points of concern with respect to both national class action settlements and the Texas settlement. They related to the extent of the funding, definitions of the class and qualifying leaks, monitoring performance, and establishing an appropriate basis for differentiating individual settlements in Texas. I also wanted to make sure that any differences with the recent settlements in San Diego were rationally distinguished. Of great concern was finally reaching global settlement so that the consumer plaintiffs across the nation could receive similar relief and begin to receive it soon.

When the discussions started the animosity between counsel and the parties was significant. It was clear that I needed to deal with this issue in order to make significant headway. For this reason I forced people to stay together and continue to discuss the issues, notwithstanding the intensity of these discussions. There is no doubt that I disapproved of some of the discussions. As people began to come together I let it be known, in no uncertain words, that as we moved forward into the next step in the negotiations that I would no longer tolerate these animosities to control the discussions. The change was significant, and we did move forward for purposes of reaching global resolution.

All settlements, by definition, involve compromise. In making these comments it is not my intent to suggest that any counsel's motivations were improper. Each had valid arguments. In summary, it was my intent to aide in finding a rational basis for compromise and at the same time make sure that the settlement met class fairness requirements. I believe it does do so for the following reasons:

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1. Funding: Under COX I questioned whether the fund was sufficient to be a truly national class resolution. If it was insufficient, then the litigation would only be delayed, not ended, and benefits to class members who were not "first in line" could be non-existent. Underfunding would also put those individuals and the judicial system to a risk of 10 more years of litigation. Under COX any funds paid by DUPONT in Spencer would potentially reduce the fund. In addition the agreement was unclear as to the disposition of any funds received from ELGERS. This raised a possibility of substantial potential reductions in the net "fund". On the other hand I also perceived that the funding demands by SPENCER counsel and Fleming were best case scenarios and subject to substantial contrary legal arguments. I also had significant concerns with the SPENCER/DUPONT settlement in that the 8% payment on replumbs would require a consumer to completely replumb and pay and pay the costs, only to receive a small amount in return. As a result my goal was, if possible, merge the two settlements, or, as a minimum, achieve a funding level that would most probably accommodate all persons who have had qualifying leaks, pay persons unreimbursed damages they have suffered, and provide an extended "warranty" period of time, with sufficient probable funding, for those persons suffering qualifying leak during this period. Evaluating the numbers of people responding to both notice programs, the number of individual claimants in Texas, and the numbers of persons already having received benefits through other settlements or relief, I believe the funding under these combined settlements meets this goal and that the probability of further litigation, as a result of underfunding, is minimal. In fact, with the increased funding, addition of the contingent ELGER's funding, and the

independent settlement of the substantial number of claims in Texas, it appears to at least triple the net funds available. I realize that there was no limit in San Diego. However you cannot compare a settlement in a small area with a settlement for the nation. I believe that the funding level here will most probably satisfy this problem. Although all plaintiff's counsel would have liked more, it is unrealistic to believe that the defendants would so agree and still give up the substantial legal and factual arguments that are compromised in this agreement. I believe this settlement represents a fair compromise and greatly diminishes the chance that the fund will run out before completion of its terms.

2. Class definitions and Time periods: COX had a window period of one year. Other settlements had longer periods of time. The definitions of qualifying leaks differ in some of the settlements. COX does not count a hot water leak within 6 feet of the water heater as a first leak toward a replumb unless it requires cutting into a wall, others do. Significantly, any such leak allows for a claim for damages. There are significant factual disputes as to this issue. The limitation is only as to a first leak; it only applies if no cut into the wall is required; the evidence suggests that if the system is defective there is a probability of multiple leaks. This makes sense. The modified settlement does provide for an extended window period from one year to two years. The remainder of the time periods are consistent with past settlements. With the modification of the extended window period, I believe the definition of the class and the qualifications are fair to the consumer class and represent a fair compromise of the competing legal and factual disputes.

3. Monitoring: The settlement as modified creates a new plumbing claims group that will have plaintiff representations from both COX and SPENCER and the defendants. If there are disputes, they are to be resolved by the judges of the national class action or a special master appointed by them. This process insures prompt attention to replumbing and payment of damages, an even handed evaluation of claims and requests for treatment as "exceptional circumstances", and a fair method of resolution of disputes. Of significance is the monitoring of the replumb procedures by plaintiffs counsel and the court.

4. Plaintiff's counsel take on the affirmative obligation to seek the relief provided for in the ELGERS/US Brass settlement and, in the event funding is insufficient, to continue with the litigation. Although I had no doubt that they would do so, I felt it important to affirmatively so represent this in the agreement.

Many of the settlements in these actions have had some differing provisions. In fact they are "trade-offs" depending on the particular situation. I believe this settlement is as good as or better than the settlements in San Diego. This settlement pays for unreimbursed damages, San Diego does not. The final date for submission of claims is significantly longer in this settlement than in San Diego. This settlement includes metal fittings; San Diego does not. Of great significance is the fact that this settlement provides for ongoing monitoring of claims by class counsel and court review in the event of disputes, in addition to the ombudsmen process. I am bothered by the failure to include that in San Diego. In that settlement the ombudsmen review is very limited, and in good

part limited to the information provided by defendants. Review and monitoring by class counsel is also limited. The increased window period here, although slightly less than San Diego, is adequate and compensates for the qualifications on leaks. Overall, the provisions of and improvements to COX/SPENCER, as reflected in the this settlement, leads me clearly to the above conclusion.

In addition to the above, it is important that I emphasize certain points. One lawyer continually proposed that we create a national class action in California and merge the other two into this new action. Although I considered his request, I continually told him I saw no basis or need for this. I told him I was acting only as a settlement judge. This role permitted me to monitor the settlement process and still permit independent review at the fairness hearing by the other respective courts. The Alabama and Tennessee courts are perfectly capable of monitoring the global settlement and are the proper courts to do so. The expenses associated with a whole new notice program would be ill spent and not necessary.

I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not

be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments". As indicated above, because of the law relating to class action, monitoring this issue was one of my responsibilities. His clients that will receive some greater relief are all persons who have actively participated in the litigation process. They are all named parties in lawsuits and have participated in some significant way in the litigation, i.e., had their units inspected and/or answered interrogatories or been deposed. All settlements, including those negotiated by attorneys in this case, have acknowledged greater compensation for individuals who have been named class representatives and/or actively participated in the litigation.

I also monitored the proceedings to insure there was no wrongful "trade of rights" between clients. I had a specific discussion concerning some of the precious demands with counsel. It was understood that some demands were a "really best case scenario" that would require extremely favorable findings of disputed facts and law, and there was appropriate room for compromise.

There appears to be a significant misunderstanding of the modified agreements by some counsel. There is no inappropriate switching of "opt outs", nor would I allow it. As noted above there are now substantial improvements reflected in these settlements. With these improvements there

is nothing wrong with merging the processes and allowing individuals another opportunity to consider whether they really want to "opt out".

The fees and costs in this case are significant. Many attorneys participated on all sides. The litigation was hard fought and complex. The fees will be divided between many attorneys and firms. I did not participate in the setting of fees. They do not come out of the fund. Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

It was my intent to try to resolve all disputes. Unfortunately we could not achieve settlement with DUPONT, primarily as a result of their dispute with SHELL and HOECHST CELANESE. I trust and hope that matter can also be settled. As a result all actions will remain pending against DUPONT, and it will be the responsibility of Judge Hardaway to determine the appropriateness of the proposed SPENCER/DUPONT settlement at a fairness hearing.

I commend all counsel for their efforts and hard work and their willingness to ultimately put aside the strong feelings that had separated them and to bring this matter to resolution. I regret that settlement could not be reached with Dupont. I commend the attorneys for Shell and Hoechst Celanese and those corporations for their willingness to proceed with the settlements with the class on the same terms and conditions and not permit the difficulties with Dupont to prejudice the class.

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All of the above will be reviewed by Judge Maloan and Judge Hardaway at the fairness hearing and by each state court judge who considers these matters. All I can say is that I was fully aware of my responsibilities and do not make this recommendation lightly. As I told all counsel, when I put my "stamp of approval" on this settlement, and make this recommendation, it reflects on my credibility. I would not and do not make this recommendation "lightly".

With the assumption that final settlement document will be prepared reflecting the principles of agreement, for the above reasons I recommend approval of the settlement and that all concerned courts accord it full faith and credit.

A copy of the final principles of agreement and settlement document, as reviewed by this court, will be presented to all courts and counsel by the attorneys.

DATED: 11-8-95

s/ Richard M. Silver
RICHARD M. SILVER
Judge of the Superior Court

(3)

No. 03-1431

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

HOSPITALITY MANAGEMENT ASSOCIATES, Inc., *et al.*,

Petitioners,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the South Carolina Supreme Court properly affirmed the granting of full faith and credit to the final judgments of the Tennessee and Alabama state courts in, respectively, *Cox v. Shell Oil Co.*, Case No. 18,844, Chancery Court, Obion County, Tennessee ("*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047, Circuit Court. Greene County, Alabama ("*Spencer*").

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners have identified all parties in this proceeding.

Pursuant to Supreme Court Rule 29.6, Respondent Shell Oil Company advises the Court that Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

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EXPLANATION OF RECORD CITES

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App. ___" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Shell App. ___" refers to the Appendix attached to Respondent Shell Oil Company's Brief in Opposition to Writ of Certiorari.

"R. ___" refers to the Record on Appeal filed with the South Carolina Supreme Court cited by specific page number.

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

This case involves a collateral attack on the 1995 final judgments of Tennessee (*Cox*) and Alabama (*Spencer*) approving two nationwide class action settlements.[1] No exceptional circumstances are present here. Petitioners are members of the *Cox* and *Spencer* settlement classes who did not opt out. They could have obtained the substantial relief offered by the *Cox* and *Spencer* settlements. Instead, they sued Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E.I. DuPont de Nemours & Co. ("DuPont") in the hope they would obtain greater relief through litigation. The South Carolina Supreme Court affirmed a summary judgment in favor of Respondents. The issue Petitioners' case raises is the full faith and credit the United States Constitution guarantees to the final judgments of the sister states.

Petitioners seek to avoid the preclusive effect of the *Cox* and *Spencer* settlements by claiming that the notices provided to absent class members in 1995 were inadequate and the classes were inadequately represented. All of Petitioners' objections about the manner of giving notice, the content of the notice, and the conduct of class counsel could have been presented to the *Cox* and *Spencer* courts in 1995. In fact, many of Petitioners' specific complaints mimic objections that were actually made in the *Cox* proceeding and ruled on by the *Cox* court. No theory of collateral review would allow Petitioners to relitigate these objections.

---

[1] Final Judgment in *Cox v. Shell Oil Co.*, Case No. 18,844 (Chancery Ct., Obion Cty., Tenn. Nov. 17, 1995) (Shell App. 40-44) and Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs in *Cox* (filed Nov. 17, 1995) (Shell App. 11-39) (collectively "*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047 (Circuit Ct., Greene Cty., Ala. Nov. 17, 1995) (R. 4385-4390) ("*Spencer*").

The decision of the South Carolina Supreme Court represents an unexceptional application of traditional full faith and credit principles. Mindful of this Court's admonition that class action judgments are subject to the same full faith and credit analysis as other judgments, the South Carolina Supreme Court carefully reviewed the settlement approval procedures employed by the Tennessee and Alabama courts and determined that those courts had scrupulously ensured that absent class members were accorded the due process this Court requires. As a result, the South Carolina Supreme Court held, the *Cox* and *Spencer* judgments were entitled to full faith and credit in the courts of South Carolina. South Carolina is not the first, but simply the most recent, state that has granted full faith and credit to the *Cox* and *Spencer* final judgments.[2]

Petitioners ask this Court to rule that they were entitled to litigate in the South Carolina courts their objections to the adequacy of notice and the adequacy of representation as if they were making them for the first time to the *Cox* and *Spencer* courts. (Pet. 14, 29-30). Notably, however, Petitioners cannot – and do not – cite any authority for such an extreme proposition. If Petitioners' theory prevailed, it would be virtually impossible for defendants ever to compromise class action litigation. Every class settlement would be subject to endless relitigation as absent class members paraded one by one through every court in this country demanding *de novo* review of every class judgment. Fortunately, that is not the law. To the contrary, where the state court approving a class action settlement has squarely addressed the due process issues, absent class members are not entitled subsequently to relitigate those issues. Labeling those issues "jurisdictional" does not expand the permissible

[2] *E.g.*, the Tennessee court's judgment in *Cox* has also been given full faith and credit by courts in Alabama, Arizona, Florida, and Wisconsin. (R. 3583; R. 3571-3574; R. 3944-3946; R. 3947-3955).

scope of review because, as this Court has held, full faith and credit principles apply equally to questions of jurisdiction. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982).

Because the South Carolina Supreme Court conscientiously applied to the *Cox* and *Spencer* judgments the principles of full faith and credit previously announced by this Court, Petitioners' application for writ or certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are all members of the 1995 *Cox* and *Spencer* nationwide settlement classes who did not opt out. Instead, they sought damages from Shell, Celanese, and DuPont for allegedly defective polybutylene ("PB") plumbing systems installed in structures they own.[3]

PB plumbing systems are comprised of PB pipe and various "fittings" that join sections of the pipe. These fittings are made from different raw materials and different designs. Respondents did not manufacture or sell the PB plumbing systems or the component parts of those systems. Rather, Shell manufactured the PB resin that was sold to third parties who extruded it into PB plumbing pipes, and Celanese and DuPont manufactured and sold acetal resins named Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.

By 1995, litigation over PB plumbing systems had been pending in many courts around the country for

[3] Because Petitioners' Statement of Facts is simply a self-serving recitation of their allegations, replete with misstatements and mischaracterizations of fact and law, Shell respectfully presents its own Statement of Facts.

almost a decade. (Shell App. 18, ¶ 1). In November 1994, the *Spencer* lawsuit – a putative nationwide class action – was filed in Alabama state court against Shell, Celanese, and DuPont. At that time Respondents were actively negotiating the settlement of another nationwide class action previously filed in Texas state court ("*Beeman*"). (Shell App. 18, ¶¶ 2-3). Although the parties reached a settlement in *Beeman*, it ultimately fell through when the Texas court denied preliminary approval in February 1995. (Shell App. 18, ¶ 3). In May 1995, DuPont reached a settlement in *Spencer*, and the Alabama court preliminarily approved it. (R. 4155-4169).

In June 1995, the *Cox* action was filed against Shell and Celanese in Tennessee.[4] (R. 4040-4059). After the *Cox* court certified a national class,[5] *Beeman* class counsel joined with *Cox* class counsel to prosecute the *Cox* action on behalf of owners of structures containing PB plumbing systems. (Shell App. 19, ¶ 4; R. 2377-2379). Meanwhile the *Spencer* court certified a class action against the non-settling defendants Shell and Celanese. At that point Shell and Celanese faced two competing nationwide class actions.

On July 31, 1995, Shell and Celanese reached a settlement with the *Cox* plaintiffs. (Shell App. 20, ¶ 10). On August 9, 1995, the *Cox* court heard arguments from the objectors to the settlement, including *Spencer* class counsel, on the adequacy of the proposed notice, the applicable due process requirements, and the adequacy of class representation. (R. 3725-3743; R. 3746-3754). On August 30, 1995, the *Cox* court heard further arguments

[4] There is no truth to Petitioners' assertion that Respondents Shell and Celanese had anything to do with the filing of the *Cox* case. (Pet. 4-5).

[5] It is similarly false that Respondents acquiesced in the Tennessee class certification. (Pet. 5 n.1). In fact, the *Cox* court itself noted that Shell and Celanese contested certification and ultimately agreed to it for settlement purposes only. (Shell App. 28, ¶ 35).

and evidence in favor of, and objections to, the notice program. (R. 2922-3050). Then, on September 22, 1995, the *Cox* court gave final approval to the forms of notice, scheduled a fairness hearing, and set opt-out and objection dates. (R. 3092-3096).

The original *Cox* settlement required Shell and Celanese to provide $850 million to pay for replumbs[6] for those claimants who had a qualifying plumbing leak and for the repair of physical damage to property resulting from a leak. (Shell App. 30, ¶¶ 45, 46). The settlement created a centralized facility, the Consumer Plumbing Recovery Center (CPRC), to administer the replumb program, which was to run until 2009. (Shell App. 21, ¶ 12(e); R. 4467, §§ 1.1-1.3). The *Cox* class included not only past and present owners of structures with PB plumbing, but also future owners. (Shell App. 36). The settlement provided for notice to be given to class members every three years and for the right of subsequent purchasers of structures with PB plumbing to opt out following receipt of these notices. (Shell App. 21, ¶ 12(e); R. 2288-2290, § 9). If at any time there were insufficient funds to pay valid claims, Shell and Celanese had the option to contribute additional funds to pay those claims. If they did not elect to do so, those class members whose claims were not paid were not barred, and they remained free to sue Shell and Celanese with all applicable statutes of limitations and/or repose tolled. (R. 2246, ¶ 12(c); R. 2280-2281, §§ 4.5.2, 4.5.3; R. 2300, § 22.2).

In October/November 1995, class counsel for both *Cox* and *Spencer*, class counsel for other putative classes, and Respondents participated in two weeks of lengthy and intense negotiations under the supervision of Judge Richard M. Silver of the California Superior Court, who was presiding over yet another putative class action

[6] A "replumb" is the replacement of a class member's leaking PB plumbing system with a new copper or CPVC plumbing system.

brought against Respondents. (Shell App. 19-20, ¶¶ 7-9). Ultimately, the parties agreed upon a joint national settlement. The global settlement enhanced in several respects the benefits available to class members under the original *Cox* settlement – Shell and Celanese agreed to increase the settlement fund to $950 million; interest on the funds would be deposited for the benefit of class members (and not credited toward the settlement amount); and the window within which a leak would entitle a claimant to a replumb without regard to the age of his plumbing system was increased from one year to two years. (R. 2516-2518; R. 2572-2577; R. 2646-2655). Judge Silver issued a report on the settlement negotiations, in which he recommended that the settlement be approved and that all courts concerned afford it full faith and credit. (Shell App. 1-10).

On November 17, 1995, the *Cox* court entered a final order approving the class action settlement with Shell and Celanese, which included $45 million for class counsel and $3,000 for the class representatives. (Shell App. 38, ¶ 12). The funds for notice and attorneys' fees were in addition to the $950 million in settlement funds, *i.e.*, the entire settlement fund was reserved for class relief. (Shell App. 21, ¶ 12(f); R. 4468, § 2.1). In addition, the settlement provided that the CPRC would be governed by an eight-member board of directors, equally representing the plaintiffs and Shell and Celanese, subject to removal and supervision by the court. (R. 2518; R. 2655-2657; R. 4467, §§ 1.1-1.3). Moreover, the settlement provided for a structured claims and appeals process, as well as an avenue for accelerated relief. (R. 2655-2657; R. 2315-2317, § IV; R. 2320-2321, § VII).

In approving the *Cox* settlement, the Tennessee court scrupulously followed the requirements of Rule 23 of the Tennessee Rules of Civil Procedure and due process. First, the court directed that notice of the settlement be given to the class. (R. 2380-2384). In two separate hearings, the court addressed the issues related to adequacy of notice.

(R. 2922-3050; R. 3684-3943). The approved notice campaign cost over $12 million and was described by the experienced professionals who designed the program as one of the most comprehensive notice campaigns ever undertaken in class action litigation. (R. 3002; R. 3097-3210; R. 4456-4465). The Tennessee court afforded class members notice of the fairness hearing and an opportunity to exclude themselves from the class or object to the settlement. (*See* R. 2504-2760). On November 8 and 9, 1995, the court held an evidentiary hearing on the fairness of the proposed settlement that was open to all parties and class members. (*See* R. 2504-2760). Finally, on November 17, 1995, the *Cox* court approved the settlement, finding that the notice campaign was "unprecedented" in scope and effectiveness and that the settlement was fair, adequate and reasonable in all respects. (Shell App. 22, ¶ 16 and 28, ¶ 38).

On the same day, the *Spencer* court gave final approval to the class action settlement against DuPont. Simultaneously, Shell, Celanese, and DuPont entered into an agreement coordinating the two settlements. (R. 1756-1760). DuPont agreed to pay 10% of all CPRC costs associated with claims arising from PB plumbing systems with acetal insert fittings, and 10% of CPRC administrative expenses (excluding costs for *Cox* attorneys' fees or notice). (R. 1756). These payments by DuPont were to come out of the *Spencer* settlement fund. This coordination allows class members to file a single claim with the CPRC and obtain relief from both settlements.

B. Procedural Background

In 2002 the trial court in South Carolina granted Respondents' motion for summary judgment and dismissed Petitioners' claims. The trial court held that the Tennessee and Alabama judgments were entitled to full faith and credit and thus precluded Petitioners' claims. With respect to Petitioners' due process arguments, the trial court found that "the record unmistakably shows that

the [*Cox* and *Spencer*] courts fully considered all due process issues relating to [their] jurisdiction over absent class members and determined that jurisdiction existed." (Pet. 42a). Reviewing the record, the trial court stressed that "the *Cox* and *Spencer* judgments were fully litigated and decided – after several adversarial proceedings and on a voluminous record – by the respective Tennessee and Alabama courts." (Pet. 46a). Thus, it determined that "the judgments are entitled to full faith and credit in this court as guaranteed by the Constitution." (Pet. 47a). Petitioners appealed directly to the South Carolina Supreme Court.

On January 12, 2004, the South Carolina Supreme Court affirmed the decision of the trial court in *Hospitality Management Associations, Inc. v. Shell Oil Co.*, 356 S.C. 644, 591 S.E.2d 611 (S.C. 2004). The South Carolina Supreme Court found that procedures to ensure due process to absent class members "were not only in place in *Spencer* and *Cox*, but were also consciously and steadfastly utilized." (Pet. App. 26a). Consequently, the South Carolina Supreme Court agreed that "the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents." (Pet. App. 27a).

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Conflict Among the Circuits or State Courts of Last Resort Regarding Proper Application of Full Faith and Credit Principles to Class Action Judgments

Petitioners assert that a conflict exists among the federal circuits and/or state courts of last resort regarding the proper approach to the full faith and credit issue when a judgment approving a class action settlement is subsequently collaterally attacked. (Pet. 1-2). Petitioners are wrong.

It is well-established by this Court that, to grant full faith and credit to another court's judgment, the reviewing court must find that the procedures in the prior litigation afforded a full and fair opportunity to litigate the relevant jurisdictional issues. The South Carolina Supreme Court carefully determined that the *Cox* and *Spencer* courts fully and fairly considered the due process requirements necessary to exercise jurisdiction over Petitioners and other absent class members. Consequently, it correctly held that the final judgments of the Tennessee and Alabama courts were entitled to full faith and credit in South Carolina.

A. The South Carolina Supreme Court Properly Followed the Full Faith and Credit Principles Enunciated by This Court

Full faith and credit is a Constitutional guarantee for all state court judgments in which the rendering court had jurisdiction. U.S. CONST. art. IV, § 1 (codified at 28 U.S.C. § 1738); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982) (citing *Durfee v. Duke*, 375 U.S. 106, 110 (1963)). The full faith and credit analysis does not change for class action cases or judgments incorporating a class action settlement. To the contrary, in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374 (1996), this Court held that class action judgments, like all other judgments, are "presumptively entitled to full faith and credit."

By its very nature, the issue of whether another court's judgment is entitled to full faith and credit involves some level of collateral review by a second court of the rendering court's judgment. In *Underwriters* this Court specified the precise inquiry the reviewing court is to make when determining whether full faith and credit is due another court's judgment – even when a party challenges the jurisdiction of the court rendering the judgment:

> [A] judgment is entitled to full faith and credit – *even as to questions of jurisdiction* – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment. The [second court], therefore, should have determined in the first instance whether the [original court] fully and fairly considered the question of . . . jurisdiction. . . . If the matter was fully considered and finally determined in the [original] proceedings, the judgment was entitled to full faith and credit in the [second court].

Underwriters, 455 U.S. at 706-07 (citing *Durfee*, 375 U.S. at 111) and at 709 n.16 (*emphasis added*).

This Court applied the rule of *Underwriters* in a class action context in *Matsushita* when it found that a Delaware judgment approving a nationwide class settlement was entitled to preclusive effect. In *Matsushita* the Court assured itself that the due process requirements of *Shutts*[7] had been met merely by *referencing* the Delaware court's findings on these matters (notice, the opportunity to be heard, and adequacy of representation), which revealed they had been fully and fairly litigated in the rendering court. *Matsushita*, 516 U.S. at 378-79. Having verified that the Delaware court had addressed the relevant due process elements, this Court delved no further.

On remand, the Ninth Circuit rejected the exact argument Petitioners make here – that absent class

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[7] A state court class action judgment involving non-resident, absent class members is entitled to full faith and credit elsewhere when the rendering state court had jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). To exercise jurisdiction over absent class members, a state court must provide them with minimum due process: (1) reasonable notice, (2) an opportunity to be heard and participate, (3) the right to opt out, and (4) adequate representation. *Id.* at 811-12.

members have a largely unfettered right to challenge collaterally the adequacy of representation in class actions. *Epstein v. MCA, Inc.*, 179 F.3d 641, 647-48 (9th Cir. 1999). To the contrary, relying on *Matsushita*, the Ninth Circuit held that "broad collateral review of the adequacy of representation (or of the other due process requirements for binding absent class members) is not available." *Id.* at 649. Absent class members' due process rights are protected, not by collateral review, but by the original certifying court. *Id.* Collateral review is limited to considering whether the procedures used by the rendering court afforded absent class members a "full and fair opportunity" to litigate any due process concerns. That review does not include any reconsideration of the merits of the due process issues. *Id.* at 648-49. In short, due process does not allow "collateral second-guessing" of the certifying court's determinations. *Id.* at 648. This Court then denied *certiorari*. 528 U.S. 1004 (1999).

Similarly, in *Fine v. America Online, Inc.*, 743 N.E.2d 416 (Ohio Ct. App. 2000), an Ohio court rejected plaintiffs' collateral attack on an Illinois nationwide class action settlement. Relying on *Matsushita*, *Shutts*, and *Epstein*, the Ohio court held that "the appropriate collateral review involves an examination of procedural due process and nothing more" because "to hold otherwise would create a form of collateral review that is inconsistent with both the spirit of the class action mechanism and the principles at the very core of the Full Faith and Credit Doctrine." *Id.* at 421. To satisfy itself that plaintiffs received the required due process in Illinois, the Ohio court looked at the Illinois court's express findings, determined that it considered the necessary factors, and held that any further inquiry was inappropriate. *Id.* at 422-23. This Court denied *certiorari* in that case as well. 532 U.S. 942 (2001).

Carefully adhering to the principles this Court outlined in *Underwriters*, *Matsushita*, and *Shutts*, the South Carolina Supreme Court – like the *Epstein* and *Fine* courts – held that proper review of another state's class action

judgment is limited to determining whether the due process issues were fully considered in the original litigation. Any other level of collateral review would be inappropriate because "it would run counter to the class action goals of efficiency and finality to allow successive reviews of issues that were, in fact, fully and fairly litigated in the rendering court." (Pet. App. 18a). As the South Carolina Supreme Court stressed, "second guessing the fully-litigated decisions of our sister courts would violate the spirit of full faith and credit." (Pet. App. 18a).

Having carefully examined the law applicable to the issue at hand, the South Carolina Supreme Court summed up the standard by which it reviewed the procedures employed in the *Cox* and *Spencer* actions and explained why it reached the unremarkable conclusion that those judgments were entitled to full faith and credit in South Carolina:

> [T]he proper scope of collateral review of a rendering court's rulings on the due process requirements for binding absent class members is one limited to a consideration of whether the procedures in the prior litigation allowed a full and fair opportunity to litigate the due process issues. It is our opinion that such procedures were not only in place in *Spencer* and *Cox*, but were also consciously and steadfastly utilized to accord minimum due process to the absent class members. Consequently, we hold the trial court correctly accorded full faith and credit to the *Spencer* and *Cox* orders approving the nationwide settlements and properly granted summary judgment to respondents.

(Pet. App. 26a-27a). This is precisely the full faith and credit analysis this Court mandated in *Underwriters*. Therefore the South Carolina Supreme Court did not err, and there is no reason to grant a writ in this case.

B. The *Stephenson* and *Homeside Lending* Decisions Do Not Conflict With the South Carolina Supreme Court Decision

Petitioners contend that the judgment of the South Carolina Supreme Court directly conflicts with the Second Circuit's decision in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd*, 539 U.S. 111 (2003). (Pet. 16). However, *Stephenson* concerned an unusual situation not present here. Contrary to Petitioners' claim, *Stephenson* does not hold that broad collateral review of class action judgments is generally available to absent class members.

Stephenson concerned the Agent Orange nationwide class settlement approved by a federal district court in New York and affirmed by the Second Circuit. *In Re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987). It was only after all the settlement funds had been paid out to other class members that the *Stephenson* plaintiffs learned for the first time of their allegedly Agent Orange-related injuries and brought suit. The district court dismissed their claims, holding that they were barred by the settlement and their suit was an impermissible collateral attack on the prior settlement. *Stephenson*, 273 F.3d at 256.

On appeal, the *Stephenson* plaintiffs sought to avoid the settlement's preclusive effect by claiming that persons whose injuries manifested themselves only after all the settlement funds were depleted were inadequately represented in the class settlement. The Second Circuit allowed them to collaterally attack the class settlement *only* because there had been *no prior determination by any court* that "addressed specifically the adequacy of representation for those members of the class whose injuries manifested after depletion of the [class] settlement funds." *Id.* at 257-58. The Second Circuit stressed that for this reason its ruling was *not* inconsistent with the Ninth Circuit's *Epstein* decision:

> Here, neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired. Without adopting the Ninth Circuit's decision in *Epstein*, we conclude that plaintiffs' collateral attack is proper even under its standard.

Id. at 258 n.6 (emphasis in original).

Nothing in *Stephenson* indicates broad collateral review would be available generally to class members who were aware of their injuries at a time when they could make claims and obtain a share of the settlement. In fact, the Second Circuit specifically noted that it had previously rejected a collateral attack on the Agent Orange settlement brought by absent class members who were eligible for compensation under the settlement. *Stephenson*, 273 F.3d at 253-55 (citing *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425 (2d Cir. 1993)). Petitioners here bear no resemblance to the *Stephenson* plaintiffs whose collateral attack was allowed only because their injuries manifested themselves for the first time after all settlement funds had been depleted. Rather, they are in the same position as the *Ivy* plaintiffs whose collateral attack was rejected by the Second Circuit. Petitioners were fully aware of their claims and had every opportunity to participate in the *Cox* settlement. They simply choose not to avail themselves of that remedy. Even the Second Circuit would not allow such absent class members to collaterally attack the settlement.

Likewise, Petitioners assert that the Vermont Supreme Court's decision in *State of Vermont v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) – in which that court refused to grant full faith and credit to a class action judgment rendered by an Alabama court – also conflicts with the South Carolina ruling. (Pet. 9, 16). Petitioners' reliance on *Homeside Lending*, however, is similarly misplaced.

In *Homeside Lending*, the Vermont Supreme Court held that Vermont mortgagors were not precluded from challenging the notorious *Hoffman* decision – where an Alabama court approved a class action settlement that resulted in absent class plaintiffs frequently "paying more in attorneys' fees to class counsel than the economic benefit they received from 'prevailing' in the litigation." 826 A.2d at 1002 n.4. Although the Vermont Supreme Court gave three reasons for its decision, the common thread among them was that the settlement transformed the *Hoffman* class members into the functional equivalent of defendants by effectively turning the "plaintiffs" into actual or potential debtors to their own class counsel.[8] *Id.* at 1008, 1010, 1015, 1017. Not only did the class members lack adequate notice of their exposure to this liability, but no one – class counsel, the defendants, or the Alabama court – was looking out for the class members' interests in this regard.

Although the defendants urged the Vermont Supreme Court to give full faith and credit to the Alabama judgment, the court declined to do so because the Alabama court in *Hoffman* never addressed the due process issues associated with effectively converting plaintiff class members into defendants and failing to warn them of their exposure to liability. *Id.* at 1019. Thus, the decision in *Homeside Lending* has no relevance to the situation here. The facts are completely different, and, as the South Carolina Supreme Court correctly found, the *Cox* and *Spencer* courts fully and fairly considered the relevant due process issues about which Petitioners complain.

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[8] The Vermont Supreme Court noted the case of one class member whose only recovery as a result of the class settlement was $2.19 in interest, but who paid an attorney's fee of $91.33. *Id.* at 1003, n.5.

II. The South Carolina Supreme Court Correctly Held That the *Cox* Judgment Was Entitled to Full Faith and Credit Under the Constitution

Having correctly concluded that the full faith and credit due state court class action judgments is determined by examining the due process procedures utilized by the rendering courts, the South Carolina Supreme Court then turned "separately to a review of the procedures utilized by the foreign courts to ensure proper notice and adequate representation."[9] (Pet. App. 19a).

A. The South Carolina Supreme Court Properly Rejected Petitioners' Challenges to the Manner of Giving Notice to *Cox* Class Members

Petitioners complain that the *Cox* notice program was deficient because not all class members were given personal notice, as opposed to the multi-media notice-by-publication campaign.[10] (Pet. 17-20). Both the trial court and the South Carolina Supreme Court considered this argument and properly rejected it.

First, as the trial court held, "individual notice is not necessarily required to meet the requirements of due process." (Pet. App. 50a). Rather, as the South Carolina Supreme Court noted, the standard for notice established by this Court is that it must be "the best practicable, 'reasonably calculated, under all the circumstances, to

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[9] Because Shell was not a party to the *Spencer* settlement, this brief addresses primarily the procedures employed by the *Cox* court to ensure that absent class members were accorded due process.

[10] As the South Carolina Supreme Court noted, "over 5.6 million individual mailed notices were sent; of those, 244,756 were mailed to South Carolina addresses. In addition, there was a toll free 800 telephone number set up to field questions about the settlement. More than 1 million calls were received and over 10,000 additional notices were mailed out." (Pet. App. 19a).

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Pet. App. 21a) (citing *Shutts*, 472 U.S. at 812, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Applying that standard, the trial court concluded:

> The record clearly reveals that the *Cox* and *Spencer* courts carefully considered the issue of how to best provide notice to unknown class members and that the issue was fully and fairly litigated. As such, their decisions that the respective notice campaigns provided the best practicable notice under all the circumstances are not subject to relitigation in this Court, and the Plaintiffs' argument provides no basis for denying full faith and credit to the *Cox* or *Spencer* judgments.

(Pet. App. 52a-53a). The South Carolina Supreme Court agreed:

> Clearly, the *Cox* court designed and utilized various procedural safeguards to guarantee sufficient notice under the circumstances. Pursuant to a limited scope of review, we need go no further in deciding the *Cox* court's findings that notice met due process are entitled to deference.

(Pet. App. 22a).

A review of the *Cox* court's findings amply supports these conclusions. First, the *Cox* court analyzed the circumstances and made the determination that not all Settlement Class members were readily identifiable:[11]

> Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia

[11] Petitioners do not contend *Cox* class counsel or Respondents had access to any readily available list of all class members.

> publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

(Shell App. 23, ¶ 19). Second, the *Cox* court reasonably concluded that the multi-faceted, multi-media campaign designed by experienced class notice experts complied with the *Shutts* standard of giving "the best notice practicable under the circumstances . . . to members of the Settlement Class." (Shell App. 27, ¶ 33). In reaching that conclusion, the *Cox* court noted that other courts had used successfully multi-faceted notice programs for large consumer or product liability class actions where most class members could not be identified at the outset. (Shell App. 27, ¶ 31).

The *Cox* court carefully considered the adequacy of the notice on four separate occasions – when it preliminarily approved the settlement and the notice program after conducting two additional hearings and entertaining objections to the forms of notice, and at the fairness hearing itself. The *Cox* court's Final Order contains detailed findings regarding the extensive scope and reach of the notice campaign. (Shell App. 22-27, ¶¶ 15-30). The *Cox* court also found it significant that the settlement provided for supplemental "notice every three years through the life of the program." (Shell App. 21, ¶ 12(e)). After considering all of the evidence, the *Cox* court found that the notice campaign "as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*]." (Shell App. 27, ¶ 32). The *Cox* court concluded that "the notice program is one of the most comprehensive class notice campaigns ever

undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the settlement class." (Shell App. 16; Shell App. 27, ¶ 33).

Because the *Cox* court squarely addressed the notice issue, this Court's decision in *Underwriters* required the South Carolina courts to give full faith and credit to the *Cox* judgment.

B. The South Carolina Supreme Court Properly Rejected Petitioners' Arguments About the Content of the *Cox* Class Notice

Petitioners also contend that the *Cox* notice failed "to make complete and adequate disclosure" of various things they claim were wrong with the *Cox* settlement. (Pet. 20-21). This contention too is foreclosed by the *Cox* court's findings.[12]

The *Cox* notice informed class members of the nature of the pending litigation, including a description of the lawsuit, the nature of PB plumbing, the criteria for being a member of the Settlement Class, the plaintiffs' allegations, and the relief sought. (R. 3960-3961). Second, the notice extensively described the terms of the proposed settlement, including the settlement fund, eligible claimants, the recovery program, the deadline for claims, the required releases and assignments, and attorneys' fees.[13] (R. 3961-3963). Third, the notice informed class members that complete information was available by calling a toll-free number, by inspecting the court files, or by writing to class

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[12] The *Cox* court found that the "notice accurately and adequately advised [class members] of this action; the proposed settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them." (Shell App. 27, ¶ 33).

[13] Contrary to Petitioners' argument (Pet. 21), the notice did disclose the amount of attorneys' fees to be paid to *Cox* class counsel. (R 3963).

counsel. (R. 3965). Finally, the *Cox* notice informed class members of the procedure for opting out and of the time and place for the fairness hearing and their right to participate and be heard. (R. 3964-3965). As a result, the *Cox* court found that the notice "fully and accurately informed Settlement Class members of all material elements of the proposed Settlement" and complied with all applicable legal standards. (Shell App. 13; *see also* Shell App. 27, ¶¶ 32, 33).

The South Carolina Supreme Court agreed, finding that the notice in *Cox* "explained the terms of the settlement, provided for the opportunity to participate (*e.g.*, by filing objections and appearing at the fairness hearing), and gave information on how to opt out." (Pet. App. 20a-21a). As such, the South Carolina court found that the *Cox* notice complied with due process. (Pet. App. 22a).

Some of Petitioners' specific criticisms about the content of the notice mimic objections to the *Cox* settlement filed by various parties, all of which were contested by *Cox* class counsel and Shell and Celanese. (R. 2468-2478; R. 3362-3385). For example, the objection was made in *Cox* that the notice did not tell class members the settlement was allegedly not commensurate with prior jury verdicts and settlements. (R. 3378). Petitioners' claim that the notice did not tell class members "thousands of objectors" were persuaded to drop their objections by the payment of "disparate settlements" was also considered: the *Cox* court found "there is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." (Shell App. 33, ¶ 66). The *Cox* court considered and rejected objections relating to the assignment to the defendants of class members' claims against DuPont. (Shell App. 30, ¶¶ 42, 45, 46).[14] In response to these objections, the *Cox* court

[14] The *Cox* court also anticipated and rejected Petitioners' criticism (Pet. 6) that the notice did not describe the results of the further settlement negotiations conducted under the supervision of Judge

(Continued on following page)

held that "[t]he notice provided to the Settlement Class was neither misleading nor defective." (Shell App. 31, ¶ 50).

Other of Petitioners' complaints fundamentally misconceive the function of a class notice. They argue that the *Cox* notice also should have described various things about the settlement they claim were objectionable, *e.g.*, that the remedy offered was allegedly not as valuable as that being provided by the defendants already under a voluntary claims adjustment process. (Pet. 20). In other words, the notice should have contained arguments Petitioners think could have been made against the *Cox* settlement. That is not the function of a class notice. There is "no obligation to include arguments for or against the settlement in the notice." *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974).

C. There Is No Due Process Requirement That Notice Actually Be Received

Petitioners argue that because they did not receive notice[15] and never appeared in either *Cox* or *Spencer*, they remain free to litigate anew their various due process challenges to those settlements. (Pet. 15, 22). Not surprisingly, Petitioners cite no authority for this proposition

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Silver in California, which obviously it did not because the notice was published prior to those negotiations:

> There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

(Shell App. 33-34, ¶ 67).

[15] For the purpose of summary judgment, Respondents accepted as true Petitioners' allegation that they never received notice of the *Cox* or *Spencer* settlements.

because their argument runs counter to the very representational nature of a class action.

This Court long ago noted that a class action, or a "representative" suit, is an exception to the rule that one cannot be bound by a judgment *in personam* unless one was made fully a party in the traditional sense. *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)); *see also* 7B Wright, Miller, & Kane, *Federal Practice and Procedure* § 1789 at 238 (2d ed. 1986). There is no requirement that a class member must "appear" in a class action to be bound by the resulting judgment. The plaintiffs in *Matsushita* and *Epstein* did not appear in the Delaware court proceedings they were trying to challenge collaterally. *Matsushita*, 516 U.S. at 372. Both this Court and the Ninth Circuit held they were bound by the Delaware class settlement and could not attack it collaterally. The whole point of the *Shutts* minimum due process requirements is to establish when an absent class member will be bound *even though he does not appear*. Moreover, *Shutts* does not require that an otherwise constitutionally sufficient notice be actually received. *E.g.*, *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

D. The South Carolina Supreme Court Properly Held That the *Cox* Court Addressed Adequacy of Representation Issues

Petitioners allege that, for a variety of reasons, the representation of the class by *Cox* and *Spencer* class counsel was inadequate. (Pet. 24-28). The South Carolina Supreme Court did not find it necessary to address the merits of these various objections. The court found it "patent that both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation." (Pet. App. 25a). Moreover, the court concluded, based on its review of the record, that such procedures were implemented throughout the *Cox* and *Spencer* proceedings. (Pet. App. 26a). In fact, the *Cox* court specifically addressed

most of Petitioners' complaints about the conduct of *Cox* class counsel.

1. There Was No Conflict Between Class Counsel and the Class

Petitioners claim that class counsel suffered two "disabling conflicts" of interest with the class: First, they say *Spencer* class counsel accepted a $30 million fee payment allegedly in exchange for withdrawing their objections to the *Cox* settlement and assigning $120 million of *Spencer* settlement proceeds to the *Cox* fund, which allegedly reduced the amount of Shell and Celanese's commitment to the *Cox* settlement. Second, they argue that, simultaneous with the class settlements, *Spencer* class counsel Fleming settled separately his individual clients' claims at "greatly disparate amounts." (Pet. 24-28). However, the *Cox* court itself fully considered and rejected similar objections.

For example, the *Cox* court addressed the objection that the assignment to Shell and Celanese of class members' claims against DuPont had the effect of reducing the value of the *Cox* settlement by the $120 million amount of the *Spencer* settlement, (*see* R. 2469-2474, ¶¶ 2B, 2F, 2L, 2X; R. 3362-3385), and held:

> Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against DuPont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement. . . .
>
> The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against DuPont and others to defendants Shell and Celanese.
>
> Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The

> original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against DuPont, regardless of whether DuPont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

(Shell App. 30, ¶¶ 42, 45, 46).

The issue of fees for *Cox* and *Spencer* class counsel was scrutinized by not one, but two courts. Acting as a settlement judge, Judge Richard Silver of the Monterey Superior Court in California actively supervised the negotiations among *Cox* counsel, *Spencer* counsel, and Respondents. In recommending the final settlement, he noted that he was especially vigilant in watching for possible conflict between class counsel and the class over the subject of attorneys fees. In his November 8, 1995 report he wrote:

> Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this to be essential to insure that the resolution of the differences did not turn on attorneys fees. . . .
>
> * * * * *
>
> Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

(Shell App. 2, 9). Thereafter the *Cox* court found, with respect to the same concern about attorneys fees, that "[t]here is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Shell App. 33, ¶ 64).

Judge Silver also rejected the claim that one of the *Spencer* class counsel suffered a "disabling conflict" by virtue of his simultaneous settlement of his individual cases:

> I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement
>
> . . . .
>
> I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments."

(Shell App. 7). Similarly, the *Cox* court found that "[t]here is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* settlement." (Shell App. 33, ¶ 66).

Because the *Cox* court addressed these issues, Petitioners were not entitled to relitigate them.

2. *Cox* Class Counsel Conducted Themselves Properly

Petitioners also contend that the conduct of *Cox* class counsel demonstrates inadequate representation. (Pet. 26-27).

However, this issue was fully litigated in the underlying litigation. The *Cox* court found that the settlement resulted from good-faith, arms-length, non-collusive negotiations (Shell App. 18), in which every aspect of the Settlement Agreement was the "subject of intense preparation and negotiation, from the amounts, to the terms, to the amount of leaks, to who was covered, to how long they

would be covered, [all of which] was gone over in detail." (R. 3723). In fact, the final settlement was the result of a two-week settlement conference overseen by Judge Silver in which numerous enhancements to the original settlement were achieved for the benefit of the class. (R. 2516-2518; R. 2572-2577; R. 2647-2655). Judge Silver's report verifies class counsel conducted themselves properly and that no extraneous factors, such as attorneys fees or class counsel's individual cases, altered the negotiations. (Shell App. 1-10).[16]

Impressed by the procedures utilized in the rendering court, the South Carolina Supreme Court stressed:

> The *Cox* court responded specifically to various objections to class counsel's alleged conflicts of interest and found such allegations to be without factual support. Indeed, the court commented on class counsel's professionalism in protecting and promoting the interests of the class. The [*Cox*] court also found that the $45 million in attorneys' fees represented only approximately 5% of the settlement fund and were not deducted from the settlement fund.

(Pet. App. 26a). After methodically examining the due process measures employed by the Tennessee court, the South Carolina Supreme Court reached the unremarkable conclusion that the *Cox* judgment was entitled to full faith and credit in South Carolina.

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[16] Petitioners' argument that *Cox* class counsel failed to adequately value the class claims is premised on a phony statistic. They claim *Cox* class counsel settled for $150 per unit. (Pet. 26). This amount is the result of dividing $950 million by the estimated 6,000,000 PB plumbing units in the United States. But the resulting $150 figure is unrelated to the relief given the class: an eligible class member is not limited to recovering $150 for his unit. He gets a replumb of his unit no matter how much it costs. (R. 2284, § 6.3). Appellants' misuse of statistics proves nothing and was properly ignored by the South Carolina courts.

E. Petitioners' *Amchem* Arguments Are Irrelevant to This Case

Based on this Court's decision in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), Petitioners argue that adequacy of representation could be achieved in *Cox* and *Spencer* only by dividing the class into sub-classes. (Pet. 8-9, 23-25). However, there are two fundamental problems with Petitioners' reliance on *Amchem*.

First, *Amchem* was not decided until more than 18 months after the judgments in *Cox* and *Spencer* became final. While *Amchem* might control the disposition of cases open for *direct* review at the time of its issuance, judgments open only to *collateral* attack are shielded from such retroactive application. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). As this Court has written, "retroactivity in civil cases must be limited by the need for finality; once suit is barred by *res judicata* or by statutes of limitations or repose, a new rule cannot reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991).

Second, Petitioners' *Amchem* argument ignores the distinction between collateral and direct review of judgment. *Amchem* was a direct appeal from a judgment approving a class settlement. Direct review of class certification orders involves a *de novo* review of the applicable legal principles under an abuse of discretion standard. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *see also Amchem*, 521 U.S. at 630 (Breyer, J., Stevens, J., concurring in part, dissenting in part). On the other hand, *Matsushita* and *Epstein* establish that a court entertaining a collateral attack on a class settlement may not determine independently whether it believes the class was adequately represented. That determination is for the court rendering the judgment and those courts to which a direct appeal to the judgment would lie. The *Cox* court found that the adequacy of representation requirement was met. Under

Matsushita and *Epstein* that determination is not subject to "second-guessing."

The South Carolina Supreme Court held it was not necessary to address either Petitioners' or Respondents' arguments about *Amchem*. (Pet. App. 25a). Instead, the South Carolina Supreme Court considered it dispositive that "both the *Spencer* and *Cox* courts had procedures in place to ensure adequate representation" and "that such procedures were implemented throughout." (Pet. App. 25a-25b). Therefore, the South Carolina Supreme Court reasoned, the *Cox* and *Spencer* judgments were entitled to full faith and credit.

In any event, there is no merit to Petitioners' contention that the interests of class members diverged in any meaningful way. All *Cox* class members, whether owners of a single family house or owners of multi-family units, shared the same goal of getting relief for any plumbing that leaked. The *Cox* settlement addresses that goal in a common manner: dwelling units that have experienced qualifying leaks gets replumbed. (R. 2284, § 6.3).

In reality, Petitioners' complaint is about the substantive terms of the *Cox* settlement: Petitioners believe that the terms are not as generous as they should have been. But the adequacy of the relief does not bear on the issue whether the trial court correctly extended full faith and credit to the *Cox* judgment. *Matsushita* and *Epstein* make clear that full faith and credit analysis does not permit any subsequent inquiry into the merits of a final class settlement. The scope of collateral review is limited to ascertaining whether the rendering court's procedures afforded class members due process. As the South Carolina Supreme Court correctly observed, "'[m]ere disagreements with the terms of a settlement cannot provide grounds for a collateral attack' on a class settlement." (Pet. App. 26a, *quoting Fine*, 743 N.E.2d at 423).

Finally, there is no merit to Petitioners' complaints about the inclusion in the *Cox* settlement class of future claimants.[17] The *Cox* settlement, however, avoids any *Amchem* notice issue by providing for successive notices to class members – every three years until the end of the program in 2009 – and giving class members who first purchased a structure of PB plumbing since the last notice the right to opt out. (Shell App. 21, ¶ 12(e); R. 2288-2290, § 9). In addition, the *Cox* settlement has several features that ensure protection of future eligible claimants and thereby eliminate any conflict between current and future claimants. For example, there is no cap on the number of claims payable. The $950 million settlement amount represents only a minimum contribution by the *Cox* defendants (*i.e.*, Shell and Celanese may contribute more if the number of claims so require it). (R. 2280, §§ 4.5.2, 4.5.3). And, if any future claimants are not afforded the relief for which they are eligible under the *Cox* settlement, they retain their rights to pursue their underlying claims against Shell and Celanese with all applicable statutes of limitations and repose tolled. (R. 2300, § 22.2).

Therefore, no conflict of interest existed in *Cox* that would necessitate separate representation of sub-classes under the Court's reasoning in *Amchem*.

CONCLUSION

The petition for writ of certiorari should be denied. The Tennessee court conscientiously followed the requirements of due process in approving the *Cox* settlement. In granting full faith and credit to the *Cox* final judgment, the South Carolina courts properly applied the rules this Court outlined in *Shutts*, *Underwriters*, and *Matsushita*. As a result, Respondents were entitled to summary judgment

[17] Petitioners themselves are not members of this group of future claimants for whom they express such solicitude. Accordingly, it is not likely that Petitioners have any standing to assert this issue.

dismissing Petitioners' collateral attack on the *Cox* settlement.

Respectfully submitted,

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APPENDIX

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MONTEREY

Date: November 8, 1995

Hon. Richard M. Silver	Judge: Bailiff:	Deputy Clerk Reporter

HELEN MEERS et al **Plaintiffs,** **vs** **SHELL OIL COMPANY, et al,** **Defendants.**	**No. M 30590** **Minute Order:** **RECOMMENDATION RE: SPENCER/COX SETTLEMENT** **RMS/bf**

APPEARANCES

Pursuant to the joint order of SPENCER, COX, and MEERS this court conducted a mandatory settlement conference commencing October 23, 1996 and continuing through November 7, 1996. At the beginning of the sessions the court explained its role and the competing interests. It is important to reiterate several of those points in this minute order.

This litigation has been ongoing for almost 10 years. Two national class actions are now pending with the plaintiff consumers represented by different counsel. A substantial number of individual cases are pending in Texas. Settlements representing small groups of consumer plaintiffs had been reached in the past. Two settlements in San Diego County have been recently consummated. If global agreement was not reached, this litigation could continue for another 10 years. The competing parties each had substantial disagreements

with settlements that had been reached in the two national class actions. It was the stated purpose of these settlement discussions to achieve global resolution of the two national class actions and the individual cases in Texas. If a fair and appropriate global settlement could be reached, I indicated I would recommend its approval to each of the courts presiding over the national class actions and also recommended that the courts presiding over the numerous state class actions accord the settlement full faith and credit.

In addition to the above I also defined my role. It was important that everyone understood that settlement, simply for the purpose of settlement, was not appropriate. Before I would agree to recommend the settlement, it would have to meet a class fairness standard. I felt this to be essential to insure that the resolution of the differences did not turn on attorney fees and, just as significantly, to insure that there was a reasonable relationship between the class settlement and the settlement of the individual cases pending in Texas. Obviously these are also matters to be considered by the judges in the required fairness hearings. I reiterate these points to assure all courts that these concerns were not overlooked and, in fact, guided all my settlement discussions and my recommendations.

I perceived several points of concern with respect to both national class action settlements and the Texas settlement. They related to the extent of the funding, definitions of the class and qualifying leaks, monitoring performance, and establishing an appropriate basis for differentiating individual settlements in Texas. I also wanted to make sure that any differences with the recent settlements in San Diego were rationally distinguished.

Of great concern was finally reaching global settlement so that the consumer plaintiffs across the nation could receive similar relief and begin to receive it soon.

When the discussions started the animosity between counsel and the parties was significant. It was clear that I needed to deal with this issue in order to make significant headway. For this reason I forced people to stay together and continue to discuss the issues, notwithstanding the intensity of these discussions. There is no doubt that I disapproved of some of the discussions. As people began to come together I let it be known, in no uncertain words, that as we moved forward into the next step in the negotiations that I would no longer tolerate these animosities to control the discussions. The change was significant, and we did move forward for purposes of reaching global resolution.

All settlements, by definition, involve compromise. In making these comments it is not my intent to suggest that any counsel's motivations were improper. Each had valid arguments. In summary, it was my intent to aide in finding a rational basis for compromise and at the same time make sure that the settlement met class fairness requirements. I believe it does do so for the following reasons:

1. Funding: Under COX I questioned whether the fund was sufficient to be a truly national class resolution. If it was insufficient, then the litigation would only be delayed, not ended, and benefits to class members who were not "first in line" could be non-existent. Underfunding would also put those individuals and the judicial system to a risk of 10 more years of litigation. Under COX any funds paid by DUPONT in Spencer

would potentially reduce the fund. In addition the agreement was unclear as to the disposition of any funds received from ELGERS. This raised a possibility of substantial potential reductions in the net "fund". On the other hand I also perceived that the funding demands by SPENCER counsel and Fleming were best case scenarios and subject to substantial contrary legal arguments. I also had significant concerns with the SPENCER/DUPONT settlement in that the 8% payment on replumbs would require a consumer to completely replumb and pay and pay [sic] the costs, only to receive a small amount in return. As a result my goal was, if possible, merge the two settlements, or, as a minimum, achieve a funding level that would most probably accommodate all persons who have had qualifying leaks, pay persons unreimbursed damages they have suffered, and provide an extended "warranty" period of time, with sufficient probable funding, for those persons suffering qualifying leaks during this period. Evaluating the numbers of people responding to both notice programs, the number of individual claimants in Texas, and the numbers of persons already having received benefits through other settlements or relief, I believe the funding under these combined settlements meets this goal and that the probability of further litigation, as a result of underfunding, is minimal. In fact, with the increased funding, addition of the contingent ELGER's funding, and the independent settlement of the substantial number of claims in Texas, it appears to at least triple the net funds available. I realize that there was no limit in San Diego. However you cannot compare a settlement in a small area with a settlement for the nation. I believe that the funding level here will most probably satisfy this problem. Although all plaintiff's counsel

would have liked more, it is unrealistic to believe that the defendants would so agree and still give up the substantial legal and factual arguments that are compromised in this agreement. I believe this settlement represents a fair compromise and greatly diminishes the chance that the fund will run out before completion of its terms.

2. Class definitions and Time periods: COX had a window period of one year. Other settlements had longer periods of time. The definitions of qualifying leaks differ in some of the settlements. COX does not count a hot water leak within 6 feet of the water heater as a first leak toward a replumb unless it requires cutting into a wall, others do. Significantly, any such leak allows for a claim for damages. There are significant factual disputes as to this issue. The limitation is only as to a first leak; it only applies if no cut into the wall is required; the evidence suggests that if the system is defective there is a probability of multiple leaks. This makes sense. The modified settlement does provide for an extended window period from one year to two years. The remainder of the time periods are consistent with past settlements. With the modification of the extended window period, I believe the definition of the class and the qualifications are fair to the consumer class and represent a fair compromise of the competing legal and factual disputes.

3. Monitoring: The settlement as modified creates a new plumbing claims group that will have plaintiff representations from both COX and SPENCER and the defendants. If there are disputes, they are to be resolved by the judges of the national class action or a special master appointed by them. This process insures prompt

attention to replumbing and payment of damages, an even handed evaluation of claims and requests for treatment as "exceptional circumstances", and a fair method of resolution of disputes. Of significance is the monitoring of the replumb procedures by plaintiffs counsel and the court.

4. Plaintiff's counsel take on the affirmative obligation to seek the relief provided for in the ELGER/US Brass settlement and, in the event funding is insufficient, to continue with the litigation. Although I had no doubt that they would do so, I felt it important to affirmatively so represent this in the agreement.

Many of the settlements in these actions have had some differing provisions. In part they are "trade-offs" depending on the particular situation. I believe this settlement is as good as or better than the settlements in San Diego. This settlement pays for unreimbursed damages, San Diego does not. The final date for submission of claims is significantly longer in this settlement than in San Diego. This settlement includes metal fittings; San Diego does not. Of great significance is the fact that this settlement provides for ongoing monitoring of claims by class counsel and court review in the event of disputes, in addition to the ombudsmen process. I am bothered by the failure to include that in San Diego. In that settlement the ombudsmen review is very limited, and in good part limited to the information provided by defendants. Review and monitoring by class counsel is also limited. The increased window period here, although slightly less than San Diego, is adequate and compensates for the qualifications on leaks. Overall, the provisions of and improvements to COX/SPENCER,

as reflected in the this [sic] settlement, leads me clearly to the above conclusion.

In addition to the above, it is important that I emphasize certain points. One lawyer continually proposed that we create a national class action in California and merge the other two into this new action. Although I considered his request, I continually told him I saw no basis or need for this. I told him I was acting only as a settlement judge. This role permitted me to monitor the settlement process and still permit independent review at the fairness hearing by the other respective courts. The Alabama and Tennessee courts are perfectly capable of monitoring the global settlement and are the proper courts to do so. The expenses associated with a whole new notice program would be ill spent and not necessary.

I was particularly sensitive to insuring independent negotiation with the individual Texas claimants and the class so that the former would not control the latter. Although I was seeking global settlement, I made it clear that if an appropriate settlement was reached with the class, and no settlement could be reached in Texas, so be it. In fact Fleming had little or no participation in negotiating the class settlement. There was absolutely NO "private inventory sale" conditioned on class settlement. No doubt I was also concerned that, because of previous animosity, Fleming not be improperly "cut out"; however, in no way would I permit him, nor did he ever try, to condition class settlement on his settlement. It was I who always kept us concentrated on global settlement.

I believe the individual settlement of his claims is rational and reasonable and does not provide inappropriate "betterments". As indicated above, because of the law relating to class action, monitoring this issue was one of my responsibilities. His clients that will receive some greater relief are all persons who have actively participated in the litigation process. They are all named parties in lawsuits and have participated in some significant way in the litigation, i.e., had their units inspected and/or answered interrogatories or been deposed. All settlements, including those negotiated by attorneys in this case, have acknowledged greater compensation for individuals who have been named class representatives and/or actively participated in the litigation.

I also monitored the proceedings to insure there was no wrongful "trade of rights" between clients. I had a specific discussion concerning some of the previous demands with counsel. It was understood that some demands were a "really best case scenario" that would require extremely favorable findings of disputed facts and law, and there was appropriate room for compromise.

There appears to be a significant misunderstanding of the modified agreements by some counsel. There is no inappropriate switching of "opt outs", nor would I allow it. As noted above there are now substantial improvements reflected in these settlements. With these improvements reflected in these settlements. With these improvements there is nothing wrong with merging the processes and allowing individuals another opportunity to consider whether they really want to "opt out".

The fees and costs in this case are significant. Many attorneys participated on all sides. The litigation was hard fought and complex. The fees will be divided between many attorneys and firms. I did not participate in the setting of fees. They do not come out of the fund. Regardless of the amount of fees, as I stated above, I set my own standards of fairness for the class and acted as a buffer against any claim that the class would suffer on account of fees.

It was my intent to try to resolve all disputes. Unfortunately we could not achieve settlement with DUPONT, primarily as a result of their dispute with SHELL and HOECHST CELANESE. I trust and hope that matter can also be settled. As a result all actions will remain pending against DUPONT, and it will be the responsibility of Judge Hardaway to determine the appropriateness of the proposed SPENCER/DUPONT settlement at a fairness hearing.

I commend all counsel for their efforts and hard work and their willingness to ultimately put aside the strong feelings that had separated them and to bring this matter to resolution. I regret that settlement could not be reached with Dupont. I commend the attorneys for Shell and Hoechst Celanese and those corporations for their willingness to proceed with the settlements with the class on the same terms and conditions and not permit the difficulties with Dupont to prejudice the class.

All of the above will be reviewed by Judge Maloan and Judge Hardaway at the fairness hearing and by each state court judge who considers these matters. All I can say is that I was fully aware of my responsibilities

and do not make this recommendation lightly. As I told all counsel, when I put my "stamp of approval" on this settlement, and make this recommendation, it reflects on my credibility. I would not and do not make this recommendation "lightly".

With the assumption that final settlement document will be prepared reflecting the principles of agreement, for the above reasons, I recommend approval of the settlement and that all concerned courts accord it full faith and credit.

A copy of the final principles of agreement and settlement document, as reviewed by this court, will be presented to all courts and counsel by the attorneys.

DATED: 11-8-95

/s/
RICHARD M. SILVER
Judge of the Superior Court

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE

AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,	) Civil Action No. 18,844)) CLASS ACTION)) OBION COUNTY
Plaintiffs,	
v.	
SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,	
Defendants.	

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement

[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants

(Continued on following page)

(the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or

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Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation.

Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox*

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[2] *Spencer, et al. v. Shell Oil, et al.*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by

the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less; approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation,

intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

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[3] *Meers, et al vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to [sic] initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notice as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered

by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, as they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared

18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice

packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed [sic] the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other

than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39 The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed*

Settlement required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the

Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of

the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak" – a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater – does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the

walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have

been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S.W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4 *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with

other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the class of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in

and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order

and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Maloan
CHANCELLOR

ENTERED: November 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL JUDGMENT

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of

July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-outs and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of

leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in

the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement

referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN,
CHANCELLOR